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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

DOCKET NO. 357

STATE OF NEW JERSEY,
Respondent,
vs.
JOHN LOUIS VASZORICH,
Petitioner-Appellant.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY, BRIEF AND APPENDIX IN SUPPORT THEREOF

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IN THE

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Docket No. ....

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOHN LOUIS VASZORICH,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable, the Chief Justice of the Supreme Court of the United States and Associate Justices:

1. Petitioner respectfully shows:

I.

Summary Statement of the Matter Involved

On September 8, 1951 the Monmouth County Grand Jury indicted John Louis Vaszorich, your petitioner herein, together with George Eugene Christian Brown and Robert John Berry on the charge that on the 8th day of Septem-

ber, 1951 they did wilfully, feloniously and with malice aforethought kill and murder one Jeremiah Delhagen, in Ocean Township, Monmouth County. The trial of this cause based on the indictment opened on November 5, 1951 and continued to December 18, 1951 when the jury returned a verdict against John Louis Vaszorich "guilty of first degree murder, with no recommendation" (D915a).* On December 19, 1951, the Court imposed the sentence of death.

Petitioner, John Louis Vaszorich, 19 years old at this time, of limited education, was taken into police custody at his home where he lived with his mother on the first day of October, 1951 (D601a) and between that date and October 4, 1951 he was transferred from the Ocean Grove Police Station (D556a) to the Deal Police Station (D556a) and to the Asbury Park Police Station (D556a). He was questioned at Deal an entire morning (D557a) by four police officers (D557a) but not permitted food until midnight (D557a). The day after he was questioned continually (D558a) and was kept that night at the Deal Police Station (D559a). He was taken to Ocean Township then to appear before the Magistrate (D559a). He was not asked if he wanted counsel (D559a) which was violative of the Rules of the Criminal Courts of the State of New Jersey. He was then taken to Freehold (D560a) where he was locked up.

On Tuesday he was given nothing to eat except some soup at 11:30 (D561a). He was then taken through the woods and questioned (D561a). On the 4th of October he was taken to the Prosecutor's office (D561a), where the assistant prosecutor and a number of officers were present (D561a). He then gave a statement which was admitted into evidence during the trial on behalf of the State (D606a).

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* Refers to Record page of Defendant's Appendix.

At the trial and during the voir dire of the examination of the panel of jurors drawn in this cause the interrogation of one prospective juror revealed the existence of a book of instructions, which had been handed to them and to the entire panel (D14a). Although this booklet contained erroneous statements of law and other prejudicial content the panel was not dismissed and instead the trial judge ordered the books removed from the panel and continued with the trial, although at the time 5 jurors had been selected (D15a).

As the attorney for the defendant Vaszorich was engaged in opening to the jury, he was interrupted by the prosecutor and censured by the trial judge (D29a).

During the course of the trial, the trial judge directed the cause to be heard in evening sessions in order, it must be assumed, to speed its progress. This was done in spite of spirited objection on the part of all counsel for the defense (D109a), because of the state of their health which deprived your petitioner of the assistance of counsel.

At the conclusion of the cause, the prosecutor, in his summation referred to matters not in evidence and to what he called an offer to defense counsel to call a special session of the Grand Jury if they had "one iota of evidence to present against John Dean to show any connection with this case" (D875a). Dean or Dino was some sort of relative to the defendant Brown. The trial court agreed to instruct the jury to disregard the remarks but failed to do so except in a very general manner (D880a).

On December 18, 1951 the jury returned a so called verdict against John Louis Vaszorich of "guilty of first degree murder with no recommendation" (D915a). Upon a poll of the jury it was discovered that 3 of the jurors did not properly designate the degree of murder involved in derogation of the statutory mandate and contrary to all

previous judicial construction of the same statute which had heretofore made it clear that such a verdict was in fact a nullity.

Your petitioner then appealed to the New Jersey Supreme Court contending that:

A. It was error for the Trial Judge, upon discovery that the jury had before it incorrect instructions, not to admit the item into evidence for review and not to declare a mistrial.

B. The Trial Judge erred in forcing the trial into overtime sessions and evening sessions; therefore causing the defendants to be precluded from having a fair and impartial trial.

C. The Trial Judge's remarks to defense counsel on his opening were unnecessary, incorrect, and prejudicial to the defendant, Vaszorich.

D. The "confession" of John Louis Vaszorich was involuntary, obtained in violation of his rights, and its admission into evidence violated the due process clause of the 14th Amendment to the Constitution of the United States.

E. The defendant, Vaszorich, was prejudiced by that part of the summation of the prosecutor wherein comment was made upon facts not in evidence.

F. The judgment of conviction should have been reversed, as upon poll three individual jurors did not indicate the degree of murder in conformity with the statute and rule provided.

He claimed a denial of a fair trial, a conviction of murder without due process of law, and a denial of fundamental fairness. The Supreme Court affirmed the judgment on June 22, 1953.

II.

Jurisdictional Statement

1. Jurisdiction of this cause is invoked under title 28 U. S. C. A., Section 1257(3). The petitioner claims the infringement of a right, privilege, or immunity under Article 14, Sec. 1, United States Constitution Amendment, and Article 1, Sec. 1, 10 of the Constitution of New Jersey 1947.

2. The stage in the proceedings in the trial, at which, and the manner in which, the federal question sought to be reviewed, were raised, are as follows:

(a) The panel of jurors from which the petit jury was drawn in this cause had before them a booklet of instruction not authorized by any court, issued for evidently advertising purposes by the Sheriff of the County of Monmouth, which booklet contained erroneous instructions of law and highly prejudicial quotations. This was a flagrant disregard of your petitioner's guarantees of not being deprived of his right to the presumption of innocence and the proper safeguard against being convicted by proof beyond a reasonable doubt and of his right to be present at every stage of the proceedings which he was not when these jurors had this booklet issued to them.

(b) The trial judge, by forcing the trial of this cause into overtime and evening sessions, deprived your petitioner of fundamental fairness of a fair trial and resulted in his conviction without due process of law.

(c) The trial judge and the prosecutor during your petitioner's attorney's opening to the jury inflamed and prejudiced the jury by making caustic, unfair and prejudicial statements to your petitioner's counsel and annihilating your petitioner's right to the fundamental fair-

ness of a fair trial and his rights with regard to the due process of law.

(d) The trial court admitted into evidence an alleged confession of John Louis Vaszorich which was involuntary, obtained in violation of his rights and its submission into evidence violated the due process clause of the 14th Amendment of the Constitution of the United States, without which confession the State certainly could not have proved the case against this petitioner.

(e) Your petitioner was prejudiced and was denied a fair and impartial trial by the remarks during the summation of the prosecutor wherein comments made by him were not based upon any fact in evidence.

(f) Upon the return of the so-called verdict it was disclosed that upon poll that 3 jurors had returned a verdict which was unsound under the statute and the decisions controlling and was ambiguous, doubtful, uncertain and void; and the judgment of the sentence of death thereon is an act *coram nom judice* constituting prejudicial error.

3. The stage in the proceedings in the New Jersey Supreme Court at which, and the manner in which, the federal questions sought to be reviewed, were raised, are as follows:

(a) In the appeal taken to the New Jersey Supreme Court pursuant to Rule 1:2-1 (c) of the New Jersey Supreme Court (Article 6, Section 5-1 (c) Constitution, 1947), your petitioner urged for reversal on these grounds:

A. It was error for the Trial Judge, upon discovery that the jury had before it incorrect instructions, not to admit the item into evidence for review and not to declare a mistrial.

B. The Trial Judge erred in forcing the trial into overtime sessions and evening sessions; therefore causing

the defendants to be precluded from having a fair and impartial trial.

C. The Trial Judge's remarks to defense counsel on his opening were unnecessary, incorrect, and prejudicial to the defendant, Vaszorich.

D. The "confession" of John Louis Vaszorich was involuntary, obtained in violation of this rights, and its admission into evidence violated the due process clause of the 14th Amendment to the Constitution of the United States.

E. The defendant, Vaszorich, was prejudiced by that part of the summation of the prosecutor wherein comment was made upon facts not in evidence.

F. The judgment of conviction should be reversed because, upon poll, two individual jurors did not designate the degree of murder in conformity with the statute and rule provided.

4. The manner in which the federal questions sought to be reviewed were passed upon by the Supreme Court of the State of New Jersey, is reported in *State* v. *Vaszorich*, — N. J. — (not yet reported) affirming the judgment; the judgment being affirmed by the narrow and close decision of 4 to 3 in a 7-man court, the Chief Justice and Justices Oliphant, Brennan and Jacobs voting for affirmance, and Justices Heher, Wachenfeld and Burling voting to reverse, copies of both the majority and minority opinions are appended hereto.

II (a).

Judgment and Opinions of the New Jersey Supreme Court, and Stay of Execution

A. The Supreme Court of New Jersey sustained a judgment of the trial court on June 22 1953.

B. The majority and dissenting opinions of the Supreme Court of New Jersey are not yet reported but are set forth at length and attached to this petition and brief in support thereof.

C. An application to stay the execution of sentence of death to enable the petitioner to apply to the United States Supreme Court for a writ of certiorari was granted by the New Jersey Supreme Court on July 15, 1953. Said application was granted to recall the mandate and stay the execution of sentence of death on that date.

II (b).

Specific Portions and Reference to the Record of the Matters Supporting the Assertion that the Court's Rulings Were of a Nature to Bring the Case Within the Statutory Jurisdictional Provision

A. Voir Dire Examination of Juror Schelleng (D6a to D16a).

"A. Oh, they might show me that I was mistaken about some recollection of fact or something of that sort. That is part of our instructions in the little blue book.

Q. You are instructed, sir, that your recollection of the facts as an individual juror may be altered by another juror's recollection? A. That is my understanding. May I read it?

Q. Be very happy to hear that. A. Well, here on Page 18 it says, 'Every juror should respect every other juror's judgment where that judgment seems to be founded upon a reasonable basis. Each juror should be willing to yield up his own judgment when it becomes apparent that he has overlooked or failed to give sufficient weight to some element that some other juror convinces him should be given greater weight.' Maybe I didn't state that quite properly, but that is what I was referring to.

Q. Let's see. A. (The witness hands book to Mr. Juska.)

Mr. Juska: May I have this marked in evidence?

The Court: What for?

Mr. Frankel: Well, just a moment.

The Court: I haven't seen it. What is it?

Mr. Juska: I am sorry sir. It is, 'Primary Instructions to Jurors,' and I have no regard and certainly mean not to pry into anything that may appear in Mr. Schelleng's handwriting because that means nothing to me, and if he desires he may erase this.

Mr. Frankel: Perhaps we can get a new book from the Sheriff.

The Court: What is the purpose of offering this in evidence? May I ask you that now?

Mr. Juska: Yes, sir. May I show it to your Honor?

The Court: In these proceedings. I will deny your offer, but you may continue your voir dire.

Mr. Juror, you will take the law from the Court presiding in this case, will you not?

The Witness: Oh, of course.

Q. However, Mr. Schelleng, if his Honor charged you the law which is any material way differed from any of the instructions contained in this pamphlet, would you, sir, be guided by the law as his Honor gave it to you or would you rely upon this little bible? A. Oh, upon what his Honor says, of course.

Mr. O'Hagan: May I see that, please?

Mr. Juska: I am sorry, Mr. Schelleng.

The Witness: That's all right.

Mr. O'Hagan: Do you mind if I look at it?

The Witness: Oh, no, not at all.

Q. And if his Honor charges you the law to be that it is your recollection of the facts offered and not the Court's and not counsel for the defendants and not the Prosecutor's recollection—will you take that to be the law that would be binding upon you? A. Yes.

Q. If it developed after you received such a charge from the Court that in your full and complete

consideration of all of the evidence you came to the conclusion that you had a reasonable doubt as to the guilt of these boys, would your thinking be changed as to that reasonable doubt by the mere fact that all of the eleven other jurors with you did not agree with you? A. It would be based upon my own judgment.

Q. And the mere fact that the eleven voted the other way wouldn't change your mind? A. Not at all.

Q. Not at all, you say? A. Not at all.

Q. So that in that regard you would not literally follow that portion of Page 18 that you have just read to us? A. That's correct.

Q. And would you remain steadfast in that finding, Mr. Schelleng, once it had grown to the proportions of a reasonable doubt in your mind and once you had determined that it was based upon legal evidence, regardless of how minute in the whole structure of the case that legal evidence might be? A. That is correct.

Q. And if you and you alone determined that that was the factual situation based upon that minute legal evidence in the case, and all of the other jurors —that is, the other eleven—voted against you, would you remain steadfast in your vote once you had concluded that your opinion as to the reasonable doubt was predicated upon good and lawful evidence? A. I would.

Q. As you sit now, Mr. Schelleng, do you know of any reason, past, present or future, as far as you can anticipate the future from what you have heard and know now, that would permit you not to sit upon this jury and base your verdict fairly and impartially upon the evidence and the law? A. I know of no such thing.

Q. Are you a neighbor of Mr. Frankel's in his new sumptious home in Interlaken? A. I didn't even know he lived there.

Q. I am sorry. May I ask where you had the good fortune or bad fortune to meet him? A. Yes. It was at a committee meeting of the Monmouth Little Symphony Orchestra. Mr. Frankel probably doesn't even remember that I was there.

Mr. Juska: I didn't know he was a musician. I think that's all for me.

By Mr. O'Hagan:

Q. Mr. Schelleng, I gather from the speed with which you quoted a particular section of this booklet that you have studied it rather carefully. A. Yes. I read it and read it over again because I was a little bothered by that one point, and I read it over and made a mark along the side indicating that.

Q. You read the whole booklet? A. Yes, I read the whole pamphlet and then I looked through it for that part which I thought, perhaps mistakenly, was bearing on the thing I was concerned about.

Q. And I suppose as you read it you tried to fix the definitions, for instance, that are in there in your mind? There are certain definitions in this pamphlet. I suppose that as you read it you tried to understand them? A. Yes, surely.

Q. And that was the reason you read them? A. I read them to find out what the instructions for the juryroom were.

Q. You recall that in that pamphlet there are a number of instructions as to the duties of jurors and instructions on the law? A. Yes.

Q. And since they are in your mind, would there not be difficulty in putting them out of your consideration if the Court should instruct you in a manner that is not the same as in this book? A. There would be no difficulty.

Q. You mean you would be able to encompass the verbal instructions given at the end of this case and differentiate it, if differentiation there should be, what you have read in this pamphlet? A. I believe so, yes.

Q. Has the frame of mind in which you approach your service as a juror in this case been influenced by what you have read in this pamplet? A. Well, that is a rather indefinite question, sir. I suppose it has. I think that the purpose of the pamphlet was to influence my frame of mind somewhat and to get it in the right frame of mind.

Q. And has it done so? A. I believe so.

Q. For instance, there is in this pamphlet a definition of the term 'reasonable doubt'. You have read that, have you not? A. Yes, but I don't recollect it in detail.

Q. But you have a general idea of what the instruction is with reference to reasonable doubt, have you? A. Yes, I couldn't quote you word for word, of course.

Q. I wouldn't think you would, sir. It is a very difficult thing to do. May I use it again, please? And then there are instructions here on the question of should consideration be given to the failure of a defendant to take the stand as a witness. Have you read that portion? A. No. I don't seem to recall that.

Q. And then there is a question here, or an instruction, 'Who are principals in the commission of a crime?' You have read that, have you not? A. Yes.

Q. And you retain in your mind the gist of the instruction here given? A. There is nothing stands in my mind as to any distinction between what I would have expected the term 'principal' to mean from what the definition there is.

Q. And then there is a question here, and instruction upon it, 'Is the punishment that may be imposed a matter for a juror's consideration?' Have you read that here? A. Yes, I did, yes. I understand that. I read it.

Q. Did you read that? A. Yes.

Q. Is the gist of that instruction in your mind? A. Yes, I understand. I believe it is. I understand that that is none of our business.

Q. If these instructions or any of them are erroneous, would it not be difficult for you to get out of your mind what you have read in these instructions to jurors? A. Well, I would be surprised if they were erroneous, but I don't think it would be so difficult getting them out of my mind.

Q. I thought possibly I might say this in view of the color of my hair, upon the principle that is difficult to teach old dogs new tricks. Having once learned something it is hard to unlearn, is it not? A.

Well, yes, except I am not very old in that. I just read it a couple of days ago.

Q. Well, Mr. Schelleng, would you think that you would be able to disassociate yourself entirely from your reading here and take the law in the case only from the instructions that are given to you or the jury, rather, at the end of the case by his Honor, Judge Giordano? A. I so believe.

Mr. O'Hagan: That's all for me.

By Mr. McCurrie:

Q. Mr. Schelleng, I notice in this pamphlet that it was prepared so that one set of questions and answers relates to civil trials and one set of questions and answers relates to criminal trials. A. I noticed that there was a section for criminal trials and I thought that the first section was general to all trials. That's what I thought.

Q. But there was a segregation of questions and answers as to criminal trials? A. That's right.

Q. And there were some distinctions that were pointed out? A. That's right.

Q. Between the functions of a jury in a criminal case and in a civil case? A. Yes.

Q. You feel, Mr. Schelleng, that regardless of what you have read in the pamphlet, regardless of what you know about this case, regardless of what you have learned from the questions and answers given since Monday here, that you can without bias, prejudice or partiality decide this case if you are selected as a juror upon the evidence presented fairly and impartially for everyone concerned? A. I believe so.

Q. And you are ready to extend to the defendants the presumption of innocence that the law allows throughout the entire case? A. Correct.

Q. Does the fact that they are being tried together have any influence upon that judgment that you will bring to bear in this case? A. None whatever.

Q. You will determine each case individually? A. Yes.

Q. As it pertains to each individual? A. Yes.

Q. I don't know whether you were asked this question or not. I don't recall. Did you know Mr. Delhagen? A. No. I know neither him nor any of his relatives.

Mr. McCurrie: No further questions.

Mr. Frankel: The State is content, sir.

Mr. Juska: In order to save time, is it my challenge?

The Court: Yes.

Mr. Juska: The Juror is satisfactory to the defendant Vaszorich.

Mr. O'Hagan: And to the defendant Brown.

Mr. McCurrie: The defendant Berry interposes a challenge.

The Court: We will take a recess for ten minutes.

(A short recess was taken.)

The Court: May I see that blue book, please?

Mr. Juska: Yes, sir.

The Court: I don't know by whose authority this book entitled 'Primary Instructions to Jurors. Compliments of Morris J. Woodring, Sheriff, Monmouth County', which booklet is supposed to contain primary instructions to jurors, was permitted to be given to the jurors. I don't know that any judge in this county has authorized the issuance of this book. At least I find nowheres contained therein such authorization.

I have not had the opportunity to examine it too carefully, but I can understand where it might be misleading when in the hands of laymen who know nothing about the law, and therefore I am going to instruct the Sheriff to pick up from each and every one of you who are serving on this panel of the jury the books in question, including the five jurors who have already been sworn. It has been the practice in this state since the inception of the new constitution to give the prospective jurors general instructions upon the opening of the sessions concerning their responsibilities and their duties in a general way, and then almost each individual judge practically repeats

nearly the same instructions to you wher you are sworn in a particular case.

In view of the fact that the law is given to you by the Court and under the system you must take the law from the Court and not from the Sheriff, I am asking that these booklets be picked up by Sheriff White now.

Mrs. Lewis: May they retain the list, your Honor?

The Court: Yes, they may retain the list.

That's all right as long as he doesn't have it here. One juror in the box has his at home, but he won't be able to go home. So it won't do him any good.

Mr. Juska: May I be heard?

The Court: Yes.

Mr. Juska: The defense, sir, would like the record to show that pursuant to your Honor's instructions the jurors in the box Numbers 2, 3 and 4 returned to Sheriff White the books in question.

The Court: 2, 3 and 4. What happened to the other two? Where is yours?

Juror Number 1: Mine is home in my other bag.

The Court: Where do you have yours?

Juror Number 5: Mine is home in another suit.

The Court: It may be noted that all the books that are available except the two, juror Number 1 and Juror Number 5, have been picked up.

Mr. Juska: May we now have a copy of the book marked into evidence?

The Court: What is the purpose of it?

Mr. Juska: Do you want it orally here or at the side bar so that it may not become part of the record?

(Counsel confer with the Court at the bench.)

The Court: Well, now that we have cleared the atmosphere I am going to send you back to the hotel and I will see you tomorrow morning at the usual hour. Don't discuss it among yourselves or permit anyone to discuss it with you, either directly or indirectly. If anyone should be so bold

as to attempt to do so, report it to me in chambers before we reconvene tomorrow morning. The remaining members of the jury are dismissed until tomorrow morning at ten a.m."

B. Court's order that sessions be continued into evening, and denial of defense attorney's motion to try the case only at the appointed times (D109a to D110a).

Mr. Juska: May it please your Honor, I personally represent to the Court that in spite of the fact that I am as anxious as anyone else to dispose of this situation, I am compelled by reasons of health to ask that the Court not sit after the appointed time. I further respectfully call your Honor's attention to Rule A-1 under the general rules of administration, which reads as follows: "The Supreme Court, the Superior Court, the County Courts and the District Courts shall sit from ten a.m. to one p.m. and from two p.m. to four p.m., unless the Chief Justice shall order otherwise."

The Court: I have got the Chief Justice's permission. The motion is denied.

Mr. McCurrie: I wonder if the record would show that I am not adverse to reasonable time beyond the time set, but I did just get out of the hospital on October 1st after four weeks in it, and actually I am still under a doctor's care. I wouldn't care to continue to sit unreasonable hours which might endanger my health. I think that should be in the record too, because I too feel that the burden of a murder trial is sufficiently grave without sitting beyond reasonable hours. I consider nine o'clock if it were consistent, to be too great a burden upon me.

Mr. O'Hagan: I feel that way too.

The Court: Nobody looks too sick to me right now.

Mr. O'Hagan: I beg your pardon?

The Court: I say, nobody looks too sick to me right now. Until such time as that situation arises, I don't feel that I have to consider it. Let's go ahead. We are wasting time.

(Counsel resume their places in the courtroom.)

C. Interruption of counsel's opening and statements of Judge and Prosecutor (D29a to D30a, and D33a).

"Now, from what Mr. Frankel says, it is indeed a perfect case. I doubt if over the radio or television any of you heard a more simple, explicit, perfect explanation of a murder, and maybe because of the short opening that my friend made some of you are wondering whether it can be just that simple, whether that is the entire story, whether that is all that happened, whether there isn't anything else to be said on behalf of these boys, and if that's all, let's send them to the electric chair at this Christmastime upon that evidence; but let's see; let's look into the evidence. 'The boy Gene Brown that Mr. Frankel is talking about has been living with this man Frank Dean or Dino, or whatever the name is, for a period of about fifteen months in our locality. Gene, like my client, Vaszorich, had not had the help and the benefit of the strong arm of a father. As was so truly said by Mr. Strauss from the stand—

Mr. Frankel: If the Court please, I don't want to interrupt counsel, but I object to the philosophizing that counsel is about to undertake when he starts speaking of what Mr. Strauss, one of the prospective jurors, said from the stand the other day.

The Court: Yes, I was going to interrupt you, but I didn't think I would do it. Now, the purpose of an opening is to tell this jury what your defense is if you have got one. Go ahead.

Mr. Juska: Well, I respectfully take objection to your Honor's remarks.

The Court: If you have a defense, tell the jury what it is.

Mr. Juska: I let my friend go to some extent, as your Honor knows, without interrupting him.

The Court: Well, I don't want to interrupt you, Mr. Juska, but I am not going to sit here and permit you to harangue on a lot of philosophies that probably will never be proven in this case. Now, I think you should be limited, and I admonish you, all of you, limit yourselves to tell this jury

what the defense is to the accusation. You plead not guilty, and that in itself should be a sufficient opening, but go ahead. I don't mind your talking, but tell us something about the defense. I would like to know that.

Mr. Juska: Shall I proceed?

The Court: Go ahead."

* * *

"Mr. Frankel: Now, if the Court please, I again must rise and ask counsel to state his defense.

The Court: Yes.

Mr. Frankel: That is the purpose of his opening. He has used a lot of words and said nothing.

The Court: That's true.

Mr. Frankel: And I would like to know what his defense is.

Mr. Juska: Now, sir, I ask for the record to show that even a person who is looking for the minutest bit of law or fact in the case, such as my friend is, and of course as he has a perfect right to look for, anybody, including a graduate of a grammar school, which my client is not, a graduate of a high school, which my client is not, can find in my opening statement a plea of not guilty. That is what it is. We are not guilty at this stage of the proceedings, and that is my plea.

The Court: Well, thank you for stating it. You have not stated it up to this moment.

Mr. Juska: I object to that remark by the Court.

The Court: That's true. I asked you to do it, and I admonished you to do it when I interrupted you and asked you to state your defense, which you didn't do until this very moment, and I thank you for stating it. Go ahead, Mr. O'Hagan."

D. Grounds of objections to admission of confession (D602a to D606a).

"Mr. Juska: Will Your Honor hear me? My statement is going to be relatively short.

I am relying principally, of course, on State against Cooper and particularly that part of

State against Cooper which holds that a prolonged interrogation which turns out to be a suction process is not the theory under which the New Jersey courts will now permit a confession to be received into evidence.

Briefly the facts in connection with John Vaszorich's statement are these. That he was apprehended in the early of morning hours of October 1st, that from that time until October 4th at 4:45 he was in the custody of the police, the police of several municipalities and the detectives connected with the prosecutor's office of this county, and the prosecutor himself; that at no time did he have the opportunity to consult with counsel, at no time accordingly was he advised he ought to have counsel, even at the time that he was arraigned in the Magistrate's court on the charge of murder.

Now, the rules specifically provide, sir, that at such a hearing, particularly where the charge is murder, the record should be scrutinized with care to see that the accused had every right that he was entitled to under our laws, and under our laws and under our rules which now apparently take precedence in matters of this kind, he was not advised by the committing magistrate of his right to have counsel. He was not advised of his right under the constitution to have a hearing or to have the assistance of friends or anyone else there. He was taken from that hearing to the courthouse in Freehold, to the county jail, in company with the other two.

Your Honor did not admit D-GB-2. Nevertheless the record shows, although the photograph is not in evidence, that the photograph was taken of this boy before he had made his confession and after he was advised that the other two had confessed. It strikes me, sir, that that is a flagrant violation of his constitutional rights, to be pictured with two boys who have already confessed to their participation in an alleged crime and put him in the picture. A close scrutiny of the photograph, if it had been produced into evidence, would

have caused me to say other things. Nevertheless it seems to me, sir, that the mere grouping of two boys who allegedly admitted their participation in a crime with one who has not, and up to that point under our law he is presumably innocent, is a violation of his rights and should not have been done. It is prejudicial to his rights and is indicative, sir, of the whole theory of this suction process; that is, first they got Berry, then they got Brown, and then after 4 days they apparently got a statement from Vaszorich.

Now, sir, the record up to this point, as I understand it, also shows that apparently now they got a confession for participation in the Delhagen case from Vaszorich by Dr. Gordon, they apparently got a confession for participation in the Delhagen case by Sheriff Brown, they apparently got a confession from Vaszorich in the Delhagen case at police headquarters by the prosecutor himself; and I say that a man has only to look at the information as to the confession and that at the very signing of the final statement which already had been, according to their evidence, made voluntarily by him, because he was given the regular questions that appear in every statement; as a matter of fact, the same questions appear in all three; but in spite of the fact that he was advised before he was given the regular questions by the prosecutor in the presence of Captain Garrity and Mr. Zuckerman that this had to be a voluntary statement, in spite of all of that precaution being taken, for some unknown reason two newspaper men were called in during the process of his signing of the statement and he was asked again whether or not what he was doing was a voluntary act.

Now, sir, that can only be resolved in one way. There must have been some reason for this extreme precaution. There must have been some reason in the getting together of this confession where someone was fearful that there might be something that wasn't just according to Hoyle and this extra precaution was taken. There is no

other way of resolving it, particularly to bring in people who are not interested in the administration of justice. Newspaper people have a job to do, to report the news, not to subscribe to confessions in criminal cases involving murder.

I submit, sir, when that was done his rights were violated.

For these reasons and in reliance on the law as expressed in State versus Cooper, which has already been referred to, I object to the offer of the confession.

The Court: The proofs in this case adduced thus far in connection with the admissibility or the inadmissibility of the written statement convince me that it was given voluntarily and that none of this defendant's constitutional rights was violated or abrogated. The statement may be admitted."

E. Prosecutor's summation—statements of matters not touching or reasonably inferred from evidence (D874a to 875a).

"Mr. Frankel • • •

My good friend speaks and spoke for the past, for the first two weeks at least, of Svengali. John Dean sat in this courtroom—I think his name is John Dean—sat in this courtroom during every day of the two weeks that you ladies and gentlemen were selected; and John Dean sat in this courtroom during this entire trial. He is this Svengali. He is the Svengali, and John Dean may be in this courtroom this morning; I don't know; but I offered a special session of the grand jury to counsel if they had one iota of evidence to present against John Dean to show any connection with this case.

John Dean means nothing to the state. If he is implicated, then he should go. If he is implicated he is guilty; but we questioned John Dean. We took a statement from him. I showed the statement to all three members of counsel before this case ever started. They read that statement."

F. Improper verdict rendered by the jury (D915a to 917a).

"(The roll of the jury was called by the Clerk.)

The Clerk: Jurors, look upon the prisoner Vaszorich. Ladies and gentlemen of the jury, have you agreed upon your verdict?

The Forelady: We have.

The Clerk: Who speaks for you, your forelady?

Madam Forelady, do you find the defendant Vaszorich guilty in the manner and form as he stands charged in the indictment, or not?

The Forelady: We find the defendant, John Louis Vaszorich, guilty of first degree murder, with no recommendation.

The Court: The verdict as rendered by the forewoman may be recorded.

Mr. Juska: Will your Honor poll them now, or after you have heard all of them?

The Court: Yes. As your individual names are called as to the defendant Vaszorich, will you be kind enough to render your own individual verdict? Your verdict has been recorded.

The Forelady: That's right.

The Court: And you have stated it.

The Forelady: That's right.

The Court: Very well. Continue with the poll.

The Clerk: Gladys E. Kahle, how say you individually as to the defendant Vaszorich?

The Forelady: Guilty of first degree murder, with no recommendations.

The Clerk: Robert E. Hill, how say you individually with reference to the defendant Vaszorich?

Juror #2: Guilty of first degree murder, without recommendation.

The Clerk: Axel E. Palm, how say you individually with respect to the defendant Vaszorich?

Juror #3: Guilty of first degree murder, without recommendation.

The Clerk: Bessie L. McIntyre, how say you individually with reference to the defendant Vaszorich?

Juror #4: Guilty of murder, with no recommendation for mercy.

The Clerk: Jane P. Cottrell, how say you as to the defendant Vaszorich?

Juror #5: Guilty of murder in the first degree, with no recommendation.

The Clerk: Clarence R. Martin, how say you individually with respect to the defendant Vaszorich.

Juror #6: Guilty of murder in the first degree with no recommendation.

The Clerk: Majorie L. Keilt, how say you individually with reference to the defendant Vaszorich?

Juror #7: Guilty, with no recommendation.

The Clerk: May Gilmour, how say you individually with reference to the defendant Vaszorich?

Juror #8: Guilty in the first degree, without recommendation.

The Clerk: Thomas J. Callahan, how say you individually with reference to the defendant Vaszorich?

Juror #9: Guilty of first degree murder, no recommendation.

The Clerk: George F. Simpson, how say you individually with reference to the defendant Vaszorich?

Juror #10: Guilty of first degree murder, without recommendation.

The Clerk: Charles D. Greene, how say you individually with reference to the defendant Vaszorich.

Juror #11: Guilty, no recommendations.

The Clerk: John V. Hart, how say you individually with reference to the defendant Vaszorich?

Juror #12: Guilty of first degree murder, with no recommendations.

The Court: The verdict that has been rendered by each individual juror may be recorded.

The Clerk: Hearken to your verdct as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against the defendant Vaszorich of murder in the first degree, with no recommendation, and so say you all.

The Court: Proceed."

III.

Statement of the Questions Presented

Whether the essential elements of fundamental fairness or due process assured to Vaszorich by Article I, Section 1, 10 of the New Jersey Constitution (1947) and the Fourteenth Amendment of the United States Constitution were denied when (a) the panel from which the jury was drawn in this cause were exposed to an incorrect and inflammatory instructions in the form of a booklet in the defendant's absence when his presence is required under the Rules of Court; (b) the trial judge forced exhausted counsel into overtime and evening court sessions thereby depriving the defendant of counsel (c) the prosecutor and trial judge interrupted and censured counsel on his opening to the jury about his statement of the defense (d) a confession, the product of continued, protracted interrogation, prolonged confinement, absence of bodily needs, psychological pressure and delayed arraignment is deemed voluntary; (e) prosecutor's prejudicial and improper remarks in summation were allowed to stand uncorrected; and (f) the verdict of the jury was improperly taken and rendered; and (g) the pronouncement of the sentence of death thereon, were sustained by the New Jersey Supreme Court.

IV.

Reasons Relied on for Allowance of Writ

1. The Supreme Court of New Jersey decided a federal question of substance, "Whether there was a denial of due process or fundamental unfairness" in the trial of this case, which decision is not in accord with its own decisions, nor with the decisions of this court, and other courts set forth in the table of cases and, including the cases of:

Avery v. *State of Alabama*, 60 S. Ct. 321, 308 U. S. 444, 84 L. Ed. 377;

Betts v. *Brady*, 316 U. S. 455-480, 62 S. Ct. 1252, 86 L. Ed. 1595;
Chambers v. *Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716;
Hopt v. *People of Utah*, 110 U. S. 574, 4 S. Ct. 202;
Lisenba v. *Cal.*, 314 U. S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280;
Malinski v. *State of N. Y.*, 324 U. S. 401, 65 S. Ct. 781;
Ochoa v. *U. S.*, 167 Fed. Rep. 2d 341;
Palko v. *Conn.*, 302 U. S. 319, 58 S. Ct. 149;
People v. *Schoos*, 399 Ill. 527, 78 N. E. 2d 245;
People v. *Weatherford*, 160 P. 2d 210 (aff. 27 Cal. 2d 401, 164 P. 2d 753);
Rochin v. *California*, 342 U. S. 165, 96 L. Ed. —, 72 S. Ct. 205, 25 A. L. R. 2d 1396;
Snyder v. *Mass.*, 291 U. S. 97, 78 L. Ed. 674, 54 S. Ct. 330;
State v. *Cooper*, 2 N. J. 540;
State v. *Cleveland*, 6 N. J. 316;
Turner v. *Pa.*, 338 U. S. 62, 69 S. Ct. 1353;
Ward v. *Texas*, 316 U. S. 547, 62 S. Ct. 1139;
Watts v. *Indiana*, 338 U. S. 49, 69 S. Ct. 1357.

2. The Supreme Court of New Jersey decided the issues of:

(a) the effect of improper booklet instructions given the panel of jurors upon the conviction of your petitioner.

(b) whether there was error in forcing the trial into overtime and evening sessions;

(c) the effect of the courts demand upon the defendant's counsel on his opening to state his defense if he had one;

(d) the admissibility of the confession extracted from the defendant;

(e) the effect of the prosecutor's remarks in summation and whether they were prejudicial;

(f) the validity of the return of the verdict under the statutes and rules made and provided; and

(e) whether there was common error, which decision is not in accord with the cited Federal and State constitutions, and applicable principles of law formulated in the cases cited in the table of cases referred to herein and public interest will be promoted by a prompt settlement thereof.

V.

Statement of the Ground Upon Which it is Contended that the Questions Involved Are Substantial

1. Amendment Fourteen, sec. 1, United States Constitution, provides that,

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any persons within its jurisdiction the equal protection of the laws";

and Article 1, 10 of the New Jersey Constitution (1947), provides that,

> "All persons are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness",

and

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense;"

and, under Article 6, Section 2, paragraph 3 of the Constitution of New Jersey (1947), the Supreme Court of said state has exclusive and plenary power to promulgate rules

governing practice and procedure and did enact rules providing for the trials of criminal causes and governing the arrest and arraignment of persons accused of crimes. In spite of these safeguards the petitioner's constitutional rights were trespassed upon.

2. A jurisdictional inquiry is required as to the constitutional validity of a conviction and sentence of death premised upon incorrect instructions given triers of fact in the absence of the defendant, a confession of guilt extracted from the defendant with palpable disregard of his rights and due process of law, deprivation of the full assistance of counsel, prejudicial conduct during the trial of both court and prosecutor and a return of a verdict which in form was contrary to the statutes of the State of New Jersey and the Rules of Court made and provided.

VI.

Certified Transcript of the Record

Petitioner presents to this Court and filed herewith as an exhibit hereto a duly verified transcript of the entire record in the case, plus a necessary abstract of part of the examination of the jury panel on voir dire, as the same appears in the New Jersey Supreme Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of New Jersey, to the end that the errors aforesaid may be corrected by this court.

Dated: September , 1953.

EDWARD F. JUSKA,
Attorney for Petitioner, John Louis Vaszorich.

LEMUEL SKIDMORE,
Attorney for Petitioner, John Louis Vaszorich.

SUPREME COURT OF NEW JERSEY

A 149 and A 150

September Term, 1952.

Argued June 1, 1953; decided.

On appeal from the County Court, Monmouth County.

Mr. Edward F. Juska argued the cause for appellant Vaszorich.

Mr. William J. O'Hagan argued the cause for appellant Brown (Messrs. Stout and O'Hagan, attorneys).

Mr. George A. Gray, Assistant Prosecutor, Monmouth County, argued the cause for respondent (Mr. J. Victor Carton, Monmouth County Prosecutor, attorney; Mr. Gray on the brief).

The opinion of the court was delivered by

BRENNAN, J.

Appellants Vaszorich and Brown, and one Berry who does not appeal, were convicted in the Monmouth County Court upon an indictment for the murder on September 8, 1951 of Jeremiah Delhagen. Vaszorich was sentenced to death, and Brown and Berry, upon the jury's recommendation, to life imprisonment. Vaszorich was nineteen years of age and both Brown and Berry were seventeen when the crime was committed.

The decedent, aged sixty, lived alone in a four-room bungalow at Wayside. In the late evening of September 8, 1951, he was asleep in a chair in his living room when the three youths, in accordance with a plan made some days earlier to burglarize the house and rob Delhagen, entered

a bedroom adjoining the living room through a window opening upon the front porch. Before going into the house Vaszorich obtained Mr. Delhagen's steelworker's claw wrench, some 17 inches long, from the cellar. Vaszorich went almost immediately to the living room where he brutally beat the sleeping man about the head numerous times with the heavy wrench. When decedent, awake and begging not to be hit, struggled to rise, Brown and Berry came to Vaszorich's aid and helped subdue him until Vaszorich succeeded in binding him with some strings of Christmas tree lights which Berry found in one of the bedrooms. Pillows and some furniture were also piled on him. Meanwhile Berry and Brown had stripped the decedent of his trousers, and Vaszorich took from his pocket a wallet containing approximately $300.00. The search of the house for other values was continued and a wrist watch and gun were taken. The decedent continued to struggle to get up, whereupon Vaszorich dragged him into the kitchen and beat him again about the head with the wrench and piled furniture, blankets and pillows and other things upon him, after which he joined Brown and Berry at the front of the house, threw the wrench in the front yard and the three left. They drove away in an automobile they had parked nearby. The car was owned by one John Dean or Dino with whom Brown lived and who allowed Brown the use of it. En route to Shark River Hills Vaszorich gave Brown and Berry each one third of the stolen money and threw the wallet, the gun and the wrist watch out of the car window at different places on the way. Vaszorich's shirt became considerably bloodied during the assault upon Mr. Delhagen, and when they reached Shark River Hills he attempted to burn his shirt, but unsuccessfully; after the three confessed the shirt was recovered by the authorities. Brown and Berry also had blood stains on their clothing. The three went to a diner in Belmar where they washed up in a washroom and then sat down to a meal of pie, coffee and sandwiches.

In the meantime Mr. Delhagen managed in some way to get to the home of a neighbor who summoned the police. He was immediately taken to Fitkin Memorial Hospital but did not respond to treatment and died in the early morning of September 10th. Later that same morning an autopsy was performed. This disclosed that the blows with the wrench caused a skull fracture and intercranial hemorrhages. There were fourteen lacerations on his head and four others distributed on the left shoulder, arm and wrist and hand.

Appellants argue a number of points, some applicable to both and others to only one of them. The points will be considered under appropriate topic headings.

THE CONFESSIONS.

Vaszorich alleges error in the admission of his confession into evidence. He contends that the proofs show that it was not voluntarily given in matter of law, that from the time of his arrest early on October 1st until the confession was signed on October 4th "he was questioned for hours on end every day by waves of inquisitors; was taken in and out of cells; was moved around to various police headquarters throughout the county and to the jail at Freehold; was taken out by detectives to look for various items allegedly used in connection with the crime; was take to a State psychiatrist; was given very little food at irregular hours and in general, every psychological trick and pressure was applied by police authorities of various municipalities, by detectives attached to the Prosecutor's office and by the Assistant Prosecutor himself." The argument concludes, "It cannot be said on the bare record itself that a statement given by a nineteen year old boy after hours and days of questioning, illegal detention, irregular meals, shifting from one police station to another and faced at all times by groups of questioning authorities, can possibly be voluntary."

This proposition that Vaszorich was the helpless victim of a relentless and reprehensible "suction" process is without support even in his own testimony. The governing principles upon this question have been discussed in several of our recent opinions and no purpose would be served in stating them again. See *State* v. *Cooper*, 2 N. J. 540 (1949); *State* v. *Bunk*, 4 N. J. 461 (1950), cert. den. 340 U. S. 839, 95 L. ed. 615 (1950); *State* v. *Pierce*, 4 N. J. 252 (1950); *State* v. *Cooper*, 10 N. J. 532 (1952); *State* v. *Grillo*, 11 N. J. 173 (1952), cert. den. —— U. S. ——, —— L. ed. —— (1953). The essence of the inquiry is whether in obtaining the confession there was observance of "that fundamental fairness essential to the very concept of justice" for "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba* v. *People of the State of California*, 314 U. S. 219, 236, 86 L. ed. 166, 180 (1941). And "Whether a statement or confession is, in fact, voluntary, depends on the facts of the individual case and the determination of the trial court will not be disturbed on appeal where the evidence is adequate to sustain it." *State* v. *Cooper*, *supra*, 10 N. J. at 550. Here Vaszorich admitted that after his arrest on October 1 at his mother's home in Ocean Grove he was first taken to the local police station and there turned over to the Deal police who took him to the Deal police station where he stayed until the next morning; that during the morning of October 1 he was questioned about matters other than the Delhagen case but not at all in the afternoon or early evening about anything except that he was interviewed by some reporters; that he was first questioned about the Delhagen murder starting at about a quarter before eleven that night and continuing, according to him, until one thirty in the morning of October 2 after which he was not disturbed until seven thirty that morning when county authorities took him into custody and he was ar-

raigned before a magistrate upon the charge of murder; that following that appearance he was taken to the jail at Freehold, the country seat, and from there to some place, with Berry, on an investigation not connected with the Delhagen case, and for a time during the afternoon was with the Director of the State Hospital at Marlboro, a psychiatrist, returning to the jail about 7:30 that evening after which he was not disturbed through the night; that throughout the day, October 2nd, little was said to him by the authorities about the Delhagen murder; that on October 3rd he was not interrogated about the case except as officers mentioned it to him incidentally while "walking through the woods"; that on October 4 he was brought to the Prosecutor's office at about 2:30 p. m. to be questioned about the Delhagen murder and that in the course of the afternoon he gave his statement, signed it and initialled the several pages. Plainly, we need not refer to the other abundant proofs supporting the finding of the trial judge in order to demonstrate that Vaszorich's contention is wholly without substance. *cf. State* v. *Grillo, supra.* "Psychological coercion" in any sense recognized in the law was not proved. See *Stein* v. *The People of the State of New York,* (U. S. Supreme Court, decided June 15, 1953, 21 U. S. Law Week, 4469).

Brown's contention is that the trial judge erred in not instructing the jury, as Brown requested, that "whether the statement of Brown was voluntarily made or not is a question to be decided by you" and in charging instead "Where there is a dispute as to the voluntary character of a statement or confession made by a defendant, the trial court must pass upon the quality of the confession. This Court after receipt of the testimony for and against the voluntary character of the statements made by these three defendants has admitted them into evidence. The confessions are now part and parcel of all the evidence in this case, and it is left for the jury to decide whether the defendants spoke the truth when they confessed. In other words,

the jurors within their province can weigh them, accept them or reject them, as you choose."

We do not see that the trial judge entirely withdrew the question of the voluntariness of Brown's confession from the jury, particularly when considered with the fact that the judge charged Brown's request number 10 which was, "If you find that the statement taken from the defendant George Eugene Christian Brown was not voluntarily made by him, I charge you that the requirement of the law is not to exclude from consideration evidence which is presumptively false, but to prevent unfairness in the use of evidence whether true or false." But, even accepting Brown's view of the effect of the charge given, it is settled in this state that, since the determination whether or not a confession is voluntary governs its competency to be received in evidence, the factual determination whether it is voluntary should in the first instance be made by the court consistent with the principle that matters of the competency of evidence are exclusively for the court to decide. It was therefore not error upon the receipt of the confession in evidence to leave to the jury only the question of credibility of the confession, to believe, or not, the facts set out therein. *State* v. *Cole,* 136 N. J. L. 606 (E. & A. 1948), cert. den. 334 U. S. 851, 92 L. ed. 1773, 334 U. S. 862, 92 L. ed. 1782 (1948); *State* v. *Foulds,* 127 N. J. L. 336 (E. & A. 1941).

We observe in passing that the finding of the trial judge that Brown's confession was voluntarily given is fully sustained by Brown's own testimony. He was arrested in the early morning of October 1 at the home in Asbury Park of John Dean or Dino, with whom he lived. He was detained during the morning at the Asbury Park police Headquarters and questioned about matters other than the Delhagen murder. He was then taken to Deal police station. He was first questioned about the Delhagen murder that night and within an hour confessed to his part. He was not disturbed during the night and admits that the following

morning when shown his completed statement he read and signed it and initialled each page in the presence of a press photographer. It is admitted on his brief that he was taken before a magistrate shortly afterwards during the same morning and arraigned on the murder charge.

Nor do we perceive any merit in the argument on his brief that he was entitled by the provisions of the Juvenile and Domestic Relations Court Act, R.S. 9:18-12 *et seq.* (superseded by N. J. S. 2A:4-14 *et seq.*) to be processed in the Juvenile Court under the procedures applicable under that law to juveniles between the ages of 16 and 18. He concedes that that court was without jurisdiction to try him upon an indictment for murder. *In re Mei,* 122 N. J. Eq. 125 (E. & A. 1937). And the amendment of R.S. 9:18-12 by P. L. 1948, c. 284, p. 1191, expressly authorized the referral of any case involving a minor between the ages of 16 and 18 "charged with an offense of a heinous nature" "to the prosecutor of the pleas of the county wherein the court is situate" to "be dealt with in exactly the same manner as any other criminal case involving an adult offender." An order of referral in compliance with the statute was duly entered on October 3 and was received in evidence.

Brown also alleges error by the trial judge in sustaining the State's objection to a hypothetical question asked a psychiatrist who testified for Brown that he was a psychopathic personality susceptible to suggestion. The question, it is said on Brown's brief, sought to elicit the opinion of the expert witness whether in making the confession "he was impelled to do so" by the alleged suggestions of the police officers "that it would be better for him" if he did. It is not made clear on the brief just how, if true, this would make the confession involuntary in the legal sense. However, the question was not phrased to produce the opinion whether in such case the confession was voluntary or involuntary. The witness was asked to state his opinion "whether or not George Brown, having the characteristics

and the mental capacity to which you have testified and which are incorporated in my question, would be able to resist the suggestions made that it would be better for him to make a statement." Counsel insisted in the course of the argument on the State's objection that this was tantamount to asking whether the witness had an opinion whether Brown's "statement (was) due to a voluntary act, or was it due to a suggestion that was made to him by someone?" The trial court did not agree but offered counsel the opportunity to rephrase the question in that form, saying "Why don't you ask him?" Counsel did not, but stated, "I shall rest on that, sir." The fact is that earlier the witness had responded that he could not answer yes or no when upon the same hypothesis he was asked, "Can you tell with reasonable certainty whether the statement so made and signed was the voluntary act of Gene Brown? Did it come of his own volition?" There was no error in the trial court's ruling in the circumstances.

The Jurors Instruction Manual

When the panel from which the jury was drawn reported for service each member was given a blue covered pamphlet entitled "Primary Instructions to Jurors" endorsed "Compliments of" the Sheriff of Monmouth County. This was not the "Manual for Petit Jurors" prepared under the direction of this court and now the only manual of this type authorized for distribution in the courts of this state. The challenged pamphlet contains a number of wholly inaccurate or misleading statements of propositions of law among which is that which occasions the controversy here, namely, a completely erroneous definition of reasonable doubt under our law. There is also imprinted on the last page a quotation from Lycurgus as follows: "On the head of the criminal lies the crime; but in a miscarriage of justice the jurors delinquent become participants of guilt."

The discovery by the trial judge and counsel that the members of the panel were in possession of copies of the pamphlet was first made in the course of the *voir dire* examination of prospective jurors and at the time only five of the fourteen jurors ultimately selected had been chosen. The selection of the jury required over two weeks from November 26 to December 10. The trial judge immediately upon the completion of the *voir dire* examination of the prospective juror during whose interrogation the fact became known promptly dealt with the problem as follows:

> "The Court: May I see that blue book, please?
> "Mr. Juska: Yes, sir.
> "The Court: I don't know by whose authority this book entitled 'Primary Instructions to Jurors. Compliments of Morris J. Woodring, Sheriff, Monmouth County', which booklet is supposed to contain primary instructions to jurors, was permitted to be given to the jurors. I don't know that any judge in this county has authorized the issuance of this book. At least I find nowheres contained therein such authorization.
> "I have not had the opportunity to examine it too carefully, but I can understand where it might be misleading when in the hands of laymen who know nothing about the law, and therefore I am going to instruct the Sheriff to pick up from each and every one of you who are serving on this panel of the jury the books in question, including the five jurors who have already been sworn. It has been the practice in this state since the inception of the new constitution to give the prospective jurors general instructions upon the opening of the session concerning their responsibilities and their duties in a general way, and then almost each individual judge practically repeats nearly the same instructions to you when you are sworn in a particular case.
> In view of the fact that the law is given to you by the Court and under the system you must take the law from the Court and not from the Sheriff, I am asking that these booklets be picked up by Sheriff White now.

"Mrs. Lewis: May they retain the list, your Honor?

"The Court: Yes, they may retain the list.

That's all right as long as he doesn't have it here. One juror in the box has his at home, but he won't be able to go home. So it won't do him any good.

"Mr. Juska: May I be heard?

"The Court: Yes.

"Mr. Juska: The defense, sir, would like the record to show that pursuant to your Honor's instructions the jurors in the box Numbers 2, 3 and 4 returned to Sheriff White the books in question.

"The Court: 2, 3 and 4. What happened to the other two? Where is yours?

"Juror Number 1: Mine is home in my other bag.

"The Court: Where do you have yours?

"Juror Number 5: Mine is home in another suit.

"The Court: It may be noted that all the books that are available except the two, juror Number 1 and Juror Number 5, have been picked up.

"Mr. Juska: May we now have a copy of the book marked into evidence?

"The Court: What is the purpose of it?

"Mr. Juska: Do you want it orally here or at the side bar so that it may not become part of the record?

"(Counsel confer with the Court at the bench.)"

Vaszorich argues that it was error not to receive the pamphlet in evidence either at that time or a number of days later on December 17th, the last day on which testimony was taken, when his counsel renewed the offer of the pamphlet in evidence "as part of my case". We note that the record does not disclose that on either occasion the trial judge was informed of the purpose of the offer. We are told on the brief that it was "so that his (Vaszorich's) record might be made for review". It is also argued that it was error for the trial judge "not to declare a mis-

trial" although no motion for a mistrial by any of defense counsel is shown by the record. In the circumstances both this court and the trial judge might well be justified in concluding that counsel did not view the situation as serious enough to call for the break-up of the trial and was content with the trial court's action in taking up the pamphlets and in instructing the jury that they were to take the law from the court. However, we shall deal with the contention made on the brief that Vaszorich is entitled to a reversal of his conviction on the ground that "this booklet is incorrect, inflammatory and highly prejudicial to the defendant."

Vaszorich relies on *Panko* v. *Flintkote Co.*, 7 N. J. 55 (1951) and *Palestroni* v. *Jacobs*, 10 N. J. Super. 266 (App. Div. 1950). Those cases lay down the principle that irregular matter having the tendency for improper influence "in a manner inconsistent with the legal proofs and the court's charge", *Panko* v. *Flintkote Co.*, 7 N. J. at 61, which gets to the jury under circumstances which deprive the party adversely affected by it of the opportunity to rebut or counteract such influence may be sufficient reason for nullification of the jury's verdict without further inquiry as to the actual effect of the irregular matter upon the jurors' minds. In each of those cases the jury verdict was annulled because the party affected had no such opportunity as the irregular matter reached the jury after the jury had retired and during their deliberations. But the principle of those decisions is not applicable here: the irregular matter came to light at a time when all parties and the trial court had a full and ample opportunity to take steps to avoid any improper influence of the manual upon the minds of the jurors and prospective jurors. The real question is whether in the circumstances of the case, with particular reference to the precautions taken by the trial judge, enough was done to dispel the tendency of the contents of the manual for improper influence. We think the prompt and firm action of the trial judge disclosed by

the excerpt from the record above was sufficient in the circumstances. Apart from the fact that no motion for mistrial was made, or even if one had been made and was denied, it is not generally necessary that a mistrial be declared. It will ordinarily suffice that the trial judge instruct the jury in definite and unexceptionable terms upon the right of the matter, which we think the trial judge did in this case, both at the time and later in his charge, when he instructed them that the jurors were to decide the case upon the evidence alone according to the law as he gave it to them. *Cf. State* v. *Bollee,* 13 N. J. Misc. 273 (Sup. Ct. 1935).

Counsel for Brown did not join in either proffer of the pamphlet in evidence made by counsel for Vaszorich, but argues error in the trial judge's refusal to make a requested charge, "I charge you that a reasonable doubt is a doubt existing for a reason, but a juror may have reasonable doubt, though unable to give good and sufficient reason for the doubt, or express it in words", informing us on the brief that the charge was requested to make certain that the jurors were not misled by the improper definition of reasonable doubt in the manual and particularly the sentence, obviously erroneous under our law, that "a reasonable doubt is one for which, should he be called upon, a juror can give a reason." The trial judge refused to charge the request upon the ground that the charge made upon the subject of reasonable doubt covered the submission. We agree that it did and find no error. The submission was fully embraced within that part of the charge which instructed the jury that reasonable doubt "refers to that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The evidence must establish the truth of the fact to a moral certainty, a certainty that convinces and directs the understanding and satisfies the

reason and judgment of those who are bound to act conscientiously upon it." *Donnelly* v. *State*, 26 N. J. L. 601 (E. & A. 1857).

The Night Trial Sessions

Both appellants assert prejudice allegedly resulting from the continuance of the trial sessions of December 10, 11 and 12 through the evening, after a dinner recess, until 9 o'clock. The trial judge ordered the evening sessions after securing the authorization of the Chief Justice as required by Rule A 1. The basis of the asserted prejudice is stated on Brown's brief: "The placing of such a burden upon counsel is a denial of the constitutional guarantee of the right of representation by counsel."

The trial judge first announced his intention to have evening sessions on Friday, December 7th, and no objection was interposed. Again, on Monday, December 10th, after selection of the jury was completed and before the opening statements by counsel, the judge announced: "Incidentally, I am going to work until nine o'clock to-night, so guide yourselves accordingly." Again no objection was interposed. It was not until shortly before the close of the afternoon session on that day that all defense counsel requested a reconsideration, asserting "reasons of health" and "that the burden of a murder trial is sufficiently grave without sitting beyond reasonable hours." This was the extent of any objection made.

The gist of the contention is that counsel's representation of their clients' interests was not what it should be under the strain of evening sessions after the protracted period required to select the jury. We think that counsel show understandable but undue modesty. Both were assigned by the court to the defense of their respective clients. The record exhibits that they were unstinting in their efforts and unsparing of their energies and gave fully of their experience and ability in the protection of

their clients' rights to a fair trial. They richly earned the commendation expressed by the trial judge at the conclusion of the trial. Their performance is another vindication of the policy of the bench and bar of this state which assures the indigent accused of proper representation on his day in court. We do not find the slightest evidence that the rights of Vaszorich or Brown in anywise suffered from any added strain upon their counsel incident to the night sessions.

RULINGS DURING TRIAL

Brown asserts error in the denial of his motion for a mistrial after the trial judge sustained his objection to a question asked Brown by the prosecutor during his cross-examination while testifying in his own defense. The question was "How soon after the Delhagen job were you involved in another armed robbery?" Brown contends that he was entitled to a mistrial because the prosecutor by the question was attempting improperly to show that Brown had committed criminal acts for which he had not been convicted and which were not connected in any way with the indictment for murder on which he was being tried and that the evidence did not fall within any exception to the rule making such testimony ordinarily inadmissible, citing *State* v. *DePaola*, 5 N. J. 1 (1950).

But Brown's testimony on his direct examination was that he had abandoned the common scheme of robbing Delhagen when he saw "all the blood and everything" and that he had become "nervous and sick" at the sight of Delhagen's blood. Immediately before the question at issue he had answered the prosecutor that the "shame" he felt during the robbery and murder was not alone for his part in what was happening to Delhagen but "for both" the robbery and the murder. The trial judge might thus well have viewed the question to be proper upon the authority of *State* v. *Barth*, 114 N. J. L. 112 (E. & A. 1935), where it was held that a defendant, on trial for

murder committed in attempting a robbery, who testified that after the homicide he suffered from remorse, was properly cross-examined to show that within a month thereafter he was involved in five other robberies. In any event, after sustaining the objection and after extended argument upon the motion for mistrial, outside the presence of the jury, the trial judge summoned the jury back to the court room and stated: "I charge you now, as emphatically as I know how, to disregard that all together. It hasn't a thing to do with the trial of this case. The court has ruled in favor of the defendant Brown in connection with that question. He need not answer it. So it is not evidence and you will disregard it." We think this instruction clearly sufficed in the circumstanies.

Brown also alleges error in the overruling of his objections to two questions put to him, concerning his whereabouts the night before his arrest, upon his cross examination while on the stand when the voluntariness of his confession was under consideration. The questions were: "Were you at Deal police headquarters" to which Brown answered, "No, I was not", and "Were you in the custody of any police officers during that time, county detectives or any other enforcement authorities?", and again the answer was "No, I was not". Brown argues that the questions contain a "harmful insinuation" prejudicial to his rights, despite his negative answers, that "Brown had been implicated in other crimes and that Brown prior to his arrest had been doing something for which he should have been in the Deal Police Headquarters". We think from our examination of the full context of the testimony in which the questions appear that the inference is most strained. In any event, the questions were clearly proper, as the trial court ruled, to test the credibility of Brown's claim on his direct examination that he had spent that night at home sleeping.

Vaszorich contends that he was prejudiced by the action of the trial judge in interrupting his counsel's opening

to the jury to press counsel to state his defense. We have examined the colloquy at that point and perceive no impropriety of the trial judge in the circumstances.

THE PROSECUTOR'S SUMMATION

Reversible error is urged by both appellants for alleged inflammatory and prejudicial statements outside the evidence by the prosecutor in the course of his summation.

We have recently had occasion to observe that comments by a prosecuting attorney upon matters not in evidence is highly improper and inconsistent with his obligation under Canon 5 of the Canons of Professional Ethics. *State* v. *Bogen and Lieberman,* ——— N. J. ——— (1953). We also noted in that case, however, that every excursion outside the evidence will not necessarily vitiate a conviction and that on the question whether the improper comment shall have that effect, the making by trial counsel of a timely and proper objection and the action of the trial judge in connection therewith are ordinarily controlling considerations.

There are three excerpts from the prosecutor's summation to which objection is assigned, but from the record it appears that none was objected to when delivered and that objection was first interposed to each of them after the trial judge had permitted the jury to retire to their hotel for lunch with instructions to "return here at a quarter of two". The request on behalf of both defendants was that the jury be "asked to disregard" the remarks "and not to consider them" which of course would not be done in the jury's absence. The court accordingly stated that he would cover the subject in his charge. Upon the jury's return from the luncheon recess the court immediately began the charge. At the very outset he emphasized the function of the jury to decide the facts and to disregard anything about the facts which he might say

if their recollection did not accord with his, and then stated: "That too, ladies and gentlemen of the jury, applies to statements made by any of the counsel. Arguments of counsel are not evidence."

In *State* v. *Bogen and Lieberman, supra,* we held that the improper remarks were not a basis for reversal in light of the facts there presented that some were not objected to, others were objected to and upon objection were withdrawn by the prosecutor, and where objected to, whether withdrawn or not, the trial judge instructed the jury to disregard them. Here under the circumstances that no objection was made until after the jury was excused so that the impropriety of the remarks could not have been dealt with by the judge, and perhaps withdrawn by the prosecutor, at a time when instructions to disregard them, if that was the court's view, might be given when of best effect, we cannot say that what was said in the charge in that regard was inadequate. The summations were not evidence and the jury was properly told that their deliberations were to be had only upon the evidence. Our conclusion is strengthened by our careful consideration of the irregular comments in all of the circumstances of the case, from which we are convinced that the remarks, singly or in combination, are not such "plain errors affecting substantial rights of the defendant" that we should be moved to exercise our powers under Rule 1:2-19(a).

THE VERDICTS

Appellants contend that the jury verdict against each was fatally defective under the principle expressed in *State* v. *Turco,* 98 N. J. L. 61 (Sup. Ct. 1922); *State* v. *Cooper,* 2 N. J. 540 (1949); *State* v. *Cleveland,* 6 N. J. 316 (1951); and *State* v. *Greely,* 11 N. J. 485 (1953).

The returns of the three verdicts, including that as to Berry, were as follows:

"The Clerk: Jurors, look upon the prisoner, Vaszorich. Ladies and gentlemen of the jury, have you agreed upon your verdict?

"The Forelady: We have.

"The Clerk: Who speaks for you, your forelady?

Madam Forelady, do you find the defendant Vaszorich guilty in the manner and form as he stands charged in the indictment, or not?

"The Forelady: We find the defendant, John Louis Vaszorich, guilty of first degree murder, with no recommendation.

"The Court: The verdict as rendered by the forewoman may be recorded.

"Mr. Juska: Will your Honor poll them now, or after you have heard them all?

"The Court: Yes. As your individual names are called as to the defendant Vaszorich, will you be kind enough to render your own individual verdict? Your verdict has been recorded.

"Forelady: That's right.

"The Court: And you have stated it.

"The Forelady: That's right.

"The Court: Very well. Continue with the poll.

"The Clerk: Gladys E. Kahle, how say you individually as to the defendant Vaszorich?

"The Forelady: Guilty of first degree murder, with no recommendations.

"The Clerk: Robert E. Hill, how say you individually with reference to the defendant Vaszorich?

"Juror #2: Guilty of first degree murder, without recommendation.

"The Clerk: Axel E. Palm, how say you individually with respect to the defendant Vaszorich?

"Juror #3: Guilty of first degree murder, without recommendation.

"The Clerk: Bessie L. McIntyre, how say you individually with reference to the defendant Vaszorich?

"Juror #4: Guilty of murder, with no recommendation for mercy.

"The Clerk: Jane P. Mottrell, how say you as to the defendant, Vaszorich?

"Juror #5: Guilty of murder in the first degree, with no recommendation.

"The Clerk: Clarence R. Martin, how say you individually with reference to the defendant Vaszorich?

"Juror 6: Guilty of murder in the first degree with no recommendations.

"The Clerk: Marjorie L. Keilt, how say you individually with reference to the defendant Vaszorich?

"Juror #7: Guilty, with no recommendation.

"The Clerk: May Gilmour, how say you individually with reference to the defendant Vaszorich?

"Juror #8: Guilty in the first degree, without recommendation.

"The Clerk: Thomas J. Callahan, how say you individually with reference to the defendant Vaszorich?

"Juror #9: Guilty of first degree murder, no recommendation.

"The Clerk: George F. Simpson, how say you individually with reference to the defendant Vaszorich?

"Juror #10: Guilty of first degree murder, without recommendation.

"The Clerk: Charles D. Greene, how say you individually with reference to the defendant Vaszorich?

"Juror #11: Guilty, no recommendations.

"The Clerk: John V. Hart, how say you individually with reference to the defendant Vaszorich?

"Juror #12: Guilty of first degree murder, with no recommendations.

"The Court: The verdict that has been rendered by each individual juror may be recorded.

"The Clerk: Hearken to your verdict as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against the defendant Vaszorich of murder in the first degree, with no recommendation, and so say you all.

"The Court: Proceed.

"The Clerk: Jurors, look upon the prisoner Brown. Members of the jury, who speaks for you, your forelady? Madam Forelady, how say you with reference to your verdict as to defendant Brown, guilty or not guilty in the manner as he stands charged in the indictment?

"The Forelady: We find the defendant George Eugene Christian Brown guilty of first degree murder, with recommendations of life imprisonment.

"The Court: Do you wish the jury polled, Mr. O'Hagan?

"Mr. O'Hagan: Yes, if your Honor please.

"The Court: Very well. You will render your own, individual verdicts as to the defendant Brown.

"The Clerk: Gladys E. Kahle, how say you individually as to the defendant Brown?

"The Forelady: Guilty of first degree murder, with recommendations of life imprisonment.

"The Clerk: Robert E. Hill, how say you individually as to the defendant Brown?

"Juror #2: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Axel E. Palm, how say you individually as to the defendant Brown?

"Juror #3: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Bessie L. McIntyre, how say you individually as to the defendant Brown?

"Juror #4: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Jane P. Cottrell, how say you individually as to the defendant Brown?

"Juror #5: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Clarence R. Martin, how say you individually with reference to defendant Brown?

"Juror #6: Guilty of murder in the first degree, with recommendations.

"The Clerk: Marjorie L. Keilt, how say you individually with reference to the defendant Brown?

"Juror #7: Guilty, with recommendation.

"The Court: Recommendation of what?

"Juror #7: Life imprisonment.

"The Court: Very well.

"The Clerk: May Gilmour, how say you individually with reference to the defendant Brown?

"Juror #8: Guilty, with recommendations of life imprisonment.

"The Clerk: Thomas J. Callahan, how say you individually with reference to defendant Brown?

"Juror #9: Guilty, with recommendation of life imprisonment.

"The Clerk: George F. Simpson, how say you individually with reference to defendant Brown?

"Juror #10: Guilty, with recommendation for life imprisonment.

"The Clerk: George F. Simpson, how say you individually with reference to defendant Brown—Or Charles D. Greene, how say you individually with reference to defendant Brown?

"Juror #11: Guilty, with recommendations to life imprisonment.

"The Clerk: John V. Hart, how say you individually with reference to defendant Brown?

"Juror #12: Guilty of murder, with recommendation of life imprisonment.

"The Court: Very well. The verdict as rendered by the individual jurors as to the defendant Brown may be recorded.

"The Clerk: Hearken to your verdict as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against defendant Brown of murder in the first degree with a recommendation for life imprisonment, and so say you all.

"The Court: You may proceed as to the defendant Berry.

"The Clerk: Jurors, look upon the prisoner Brown (sic). Who speaks for you, your forelady? Madame Forelady, how say you as to defendant Berry, guilty or not guilty in the manner and form as he stands charged in the indictment?

"The Forelady: We find the defendant Robert John Berry guilty of first degree murder, with recommendations to life imprisonment.

"The Court: Do you wish the jury polled, Mr. McCurrie?

"Mr. McCurrie: Yes, if you please.

"The Court: You will render your own individual verdicts as to the defendant Berry.

"The Clerk: Gladys E. Kahle, how say you individually with reference to defendant Berry?

"The Forelady: Guilty of first degree murder, with recommendations of life imprisonment.

"The Clerk: Robert E. Hill, how say you individually with reference to defendant Berry?

"Juror #2: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Axel E. Palm, how say you individually with reference to defendant Berry?

"Juror #3: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Bessie L. McIntyre, how say you individually with reference to defendant Berry?

"Juror #4: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Jane P. Cottrell, how say you individually with reference to defendant Berry?

"Juror #5: Guilty of first degree murder, recommendation for life imprisonment.

"The Clerk: Clarence R. Martin, how say you individually with reference to defendant Berry?

"Juror #6: Guilty of first degree murder, with recommendations for life.

"The Clerk: Marjorie L. Keilt, how say you individually with reference to defendant Berry?

"Juror #7: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: May Gilmour, how say you individually with reference to defendant Berry?

"Juror #8: Guilty of first degree murder, with recommendation of life imprisonment.

"The Clerk: Thomas J. Callahan, how say you individually with reference to defendant Berry?

"Juror #9: Guilty of first degree murder, with recommendation of life imprisonment.

"The Clerk: George F. Simpson, how say you individually with reference to defendant Berry?

"Juror #10: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Charles D. Greene, how say you individually with reference to defendant Berry?

"Juror #11: Guilty, with recommendations of life imprisonment.

"The Clerk: John V. Hart, how say you individually with reference to defendant Berry?

"Juror #12: Guilty of murder, with recommendations for life imprisonment.

"The Court: The verdict as rendered by the individual jurors concerning the defendant Berry may be recorded as rendered.

"The Clerk: Hearken to your verdict as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against defendant Berry of murder in the first degree, with a recommendation for life, and so say you all.

"The Court: The prisoners may be remanded."

It should be at once observed that the jury's verdicts as rendered by the forelady in all three cases were in compliance with the provisions of R.S. 2:138-2 (superseded by N.J.S. 2A:113-2) and R.S. 2:138-4 (superseded by N.J.S. 2A:113-4) under which it is imperative that the jury "shall * * * designate by their verdict whether it be murder in the first degree or in the second degree" and that the death sentence shall be exacted "unless the jury shall by its verdict, and as a part thereof, * * * recommend imprisonment at hard labor for life." Thus, but for the fact that the jury was polled in each case, the sentences of death upon Vaszorich and of life imprisonment upon Brown could not have been impugned for any defect in the verdicts as returned by the forelady for the jurors collectively.

The verdicts are asserted to be nullities solely by reason of the failure of Jurors 4, 7 and 11 in the Vaszorich case, and of Jurors 7 to 12, both inclusive, in the Brown case, to specify on the poll of the individual jurors "first degree murder" as the degree of the crime of murder of which each found the respective defendants guilty.

The correctness of the two verdicts as rendered by the forelady distinguishes the question in these cases from the question presented in the *Turco, Cooper* and *Greely* cases. Each of those decisions turned upon the effect of a deficient collective verdict which it was held was not corrected in any fashion. In the *Turco* and *Cooper* cases a collective verdict simply of "guilty" rendered by the foreman was held not to warrant a conviction of first degree murder and a sentence of death, in view of the statutes above cited; and no curative inference could properly be drawn from the fact that the indictment, the charge to the jury and the State's evidence and theory of the case all were predicated upon either a verdict of first degree murder or an acquittal. So too, in the *Greely* case the collective verdict as rendered by the foreman declared the defendant "guilty as charged, with a recommendation of life imprisonment". We held that that form of verdict also was inadequate and could be cured neither by inference arising from the recommendation, a feature exclusively characteristic of first degree murder verdicts, nor by a poll in which each juror used precisely the same words.

Here we have no occasion to consider how such a defective or uncertain collective verdict may be cured, by a poll, *cf. State* v. *Cleveland, supra,* at 322, *People* v. *Orr,* 246 N. Y. S. 673 (Madison County Ct. 1930), *Solar* v. *United States,* 86 Atl. 2d, 538 (Munic. Ct. App. D. C. 1952), or indeed by any means short of the jury's retirement and reconsideration and the rendering of a sufficient return. The question is solely whether an adequate collective verdict, as rendered by the foreman, is to be vitiated by informal responses of some of the jurors upon the poll.

It "is a solemn obligation * * * in a matter of the utmost gravity" of the court as well as of the jury to insure that no one be convicted of first degree murder "by intendment or a presumption based upon the evidence" or by "an inference because a juryman fails to

dissent" or by "the failure of the accused, at the time of sentence, to question the sufficiency of the verdict", or other than by a verdict "specific", "direct and positive". *State* v. *Cooper, supra; State* v. *Cleveland, supra; State* v. *Johnson,* 14 So. 295 (Sup. Ct. La., 1894). In this light must we consider the nature and purpose of a poll of the jury following upon a correct collective verdict.

The right of the accused on trial to request a poll of the jury was given by R.S. 2:190-14 and is now found in Rule 2:7-9(d). It is not in New Jersey, as it is in some states, a matter lying within the discretion of the trial judge. The purpose of a poll is primarily to determine whether "there is not unanimous *concurrence*" of the jury in the verdict as rendered by the foreman, Rule 2:7-9(d). "The practice of long standing requires each juror to answer for himself, thus creating individual responsibility, *eliminating any uncertainty* as to the verdict as announced by the foreman", *State* v. *Cleveland, supra,* at 322.

In *Heinze* v. *State,* 42 Atl. 2d, 128, 132 (Ct. App. Md. 1945), it was said:

> "* * * when a jury is polled each juror is called by name and asked the question whether the verdict as delivered by the foreman is his verdict, in order to make sure that all of the jurors concur in the verdict. Each juror is called on to answer for himself in his own language; and while the exact words used by the juror in answering the clerk are not material, the answer clearly indicates the assent of the individual mind to the verdict."

The fact of individual *concurrence* is the objective, *State* v. *Hubbs,* 242 S. W. 675 (Sup. Ct. Mo., 1922); otherwise stated, "to ascertain from each juror whether his individual conclusion was correctly expressed by the verdict which the foreman had rendered", *Margulies* v. *State,* 137 Atl. 896, 898 (Ct. App. Md. 1927). See also *State* v. *Thursby,* 245 S. W. 2d 859 (Sup. Ct. Mo. 1952); *Jackson* v. *State,* 41 So. 178 (Sup. Ct. Ala. 1906); *Anno. Ann. Cas.* 1912 B.

1236; 2 *Bishop's New Criminal Procedure* (2d ed.), 865, sec. 1003 (3). Thus it was held error in *State* v. *Boger*, 163 S. E. 877, 878 (Sup. Ct. N. C., 1932) to poll the jury by requesting each juror who voted for the announced verdict to stand, the court remarking:

> "The defendant was entitled as a matter of right to know whether each juror assented to the verdict announced by the juror who undertook to answer for the jury * * *. To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented, and still assents, to the verdict tendered to the court."

Although a poll of the jury is the right of the accused, it is not a necessary ingredient of his conviction, but must be requested by timely request, Rule 2:7-9(d), and may be waived by a failure to make such request, *State* v. *Blisak*, 26 N. J. Misc. 197 (Quarter Sessions, 1948); *People* v. *Chamberlain*, 55 Pac. 2d, 240 (D. Ct. App. Cal., 1936); *Asher* v. *Commonwealth*, 299 S. W. 568 (Ct. App. Ky., 1927); *People* v. *Schneider*, 139 N. Y. S. 104 (Sup. Ct., App. Div., 1912); *Owens* v. *United States*, 58 F. 2d, 684 (Ct. App., D. C., 1932); *Hommer* v. *State*, 37 Atl. 26 (Ct. App. Md. 1897); Anno., Ann. Cas. 1912 B. 1236.

The required assent of each juror to the correct verdict rendered by the foreman need not be in formal or literal style, provided only that it be unmistakable in meaning. *Heinze* v. *State, supra; Margulies* v. *State, supra.* Thus in *State* v. *Myers*, 7 N. J. 465, 484 (1951), where the jurors answered variously, "Yes", "Yes, sir", "It is", to the question put by the clerk to each of them whether murder in the first degree with a recommendation of life imprisonment was his verdict, we held that "each (juror) expressly indicated that was his verdict. Each juror announced his finding of the defendant's guilt and specified the degree of murder. The right to a poll of the jury * * * was fully satisfied."

State v. *Cleveland, supra,* is not contrary. There, as here, the foreman's verdict met the statutory requirements; but each juror merely answered "guilty" to the clerk's question "How do you find." This incomplete answer to an equivocal question distinguishes the case from *State* v. *Myers, supra,* and clearly fell short of the law's requirement that the juror's answer upon the poll, whatever the words used, be unmistakable in meaning and clearly indicate his assent to the verdict announced by the foreman.

We do not think that the jurors' answers under attack here violate this important safeguard. Notably each juror whose answer is challenged specified "no recommendation" in the case of Vaszorich, or "with recommendation of life imprisonment" in the case of Brown. Each of these statements, as noted above exclusively characteristic, in one or the other form, of a verdict of murder in the first degree, does not in New Jersey correct a collective verdict announced by the foreman if that collective verdict is deficient in failing to state the degree of the crime, *State* v. *Greely, supra,* although it is held otherwise by the majority of states which have passed upon the point. 41 *C.J.S.* 247 *"Homicide"*, sec. 404; *Wharton on Homicide* (3d ed. 1041), sec. 652; see *Milton* v. *State,* 115 So. 851 (Ct. App. Ala., 1928); *Hall* v. *Commonwealth,* 270 S. W. 5 (Ct. App. Ky., 1925); *Hobson* v. *Youell,* 15 S. E. 2d, 76 (Sup. Ct. App., Va., 1941).

We believe, however, that the inference necessarily suggested by the recommendation, or lack of it, may sufficiently show individual *concurrence* in a correct verdict, at least in combination with other factors. As was said in *Hall* v. *Commonwealth,* 270 N. W., at p. 9:

> "In finding the defendant guilty and fixing his punishment at death, which punishment could be inflicted only in the event the jury found him guilty of murder, the jury unerringly indicated the offense of which it found Hall guilty * * *."

But there are also indicia of concurrence here not present in the individual responses in *State* v. *Cleveland, supra.* In the case of Vaszorich each challenged answer was given after several other jurors had stated their assents in unexceptionable terms and differed from such other responses only in the failure to specify "first degree murder" in terms. In the Brown case the challenged answers followed in sequence after the first six jurors had each announced "Guilty of first degree murder, with recommendation of life imprisonment"; again the answers under attack differed only in the failure to specify "first degree murder" in terms. This strongly suggests that the answers in each case were the product, not of ambiguity or misapprehension in the minds of the entire jury, as in the *Cleveland* case, but rather of momentary inadvertence to a form of expressing assent to the designation of the degree which, at best, is awkward for laymen to state, and such inadvertence for that reason should not be taken to evince any lack or failure of specific and fixed intent on the part of any of such jurors as to what the verdict in fact was. Trial judges might well minimize the chance of such inadvertent expressions by jurors by polling the jury in the manner used in *State* v. *Myers, supra,* which requires of each juror only the simple response "Yes", "it is", or the like. And that it was only such momentary inadvertence here is further shown by the fact that each juror in question, with the exception only of Juror number 11, did specify "first degree murder" in terms in stating his assent to the verdicts in one or another of the three cases.

Denial of Vaszorich's Motion for a New Trial

The motion was based upon allegedly newly discovered evidence, namely, a sworn statement of Berry, who did not appeal, which was given within a month after his confinement to State prison under his life sentence. He states that it was he and not Vaszorich who wielded the steel

worker's wrench, that Vaszorich had only a small bar in his hand; that both first struck Delhagen at about the same time, that when Delhagen awoke, Vaszorich threw him to the floor and held him down while Berry "hit him two or three more times" with the wrench, that Vaszorich then tied Delhagen with the Christmas tree light strings and left Berry to watch him while he searched the house for things to steal, that the victim "was still making quite a lot of noise so I hit him about six or seven more times on the head"; that he assisted Vaszorich to drag Delhagen into the kitchen where "I hit him one more time" "still with the steel worker's wrench". He states, "I am making this statement only because I can't see John die for something I have done." Brown also swore to a statement which disclaimed any knowledge from observation that Berry had struck Delhagen with the bar he saw in his hands, but affirmed that Berry had told him he had hit Delhagen after he was dragged into the kitchen.

It is settled that the trial court's discretion to grant or deny a new trial upon the ground of alleged newly discovered evidence is to be guided by three criteria, namely, that "the new evidence (1) must be material to the issue and not merely cumulative nor impeaching nor contradictory; (2) that it has in fact been discovered since the former trial and could not have been discovered before such trial by the exercise of due diligence; (3) that it would probably change the result if a new trial was granted", *State* v. *Bunk,* 4 N. J. 482, 486 (1950); *State* v. *Hunter,* 4 N. J. Super. 531 (App. Div. 1949). In addition, where, as here, the alleged new evidence is recanting testimony, a particularly unreliable form of proof, and if true, involves a confession of perjury, we approach the question whether the trial judge erred in exercising his discretion to deny a new trial mindful of the principle phrased by Mr. Justice Cardozo in his concurring opinion in *People* v. *Shilitano,* 112 N. E. 733 (Ct. App., N. Y. 1916), "* * * I do not mean that to justify a new trial, he must

have been convinced—firmly or with a sense of certainty convinced—that the first story of the witnesses was false and that their new story was true. He might act upon a reasonable probability. But, if on the contrary, he was convinced that the second tale is false, that a criminal league had been formed to set at naught the verdict of the jury and the judgment of the court, his duty was clearly marked * * * He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumph. He was charged with a responsibility to seek the truth himself."

Here the trial judge grounded his decision upon the conclusion that at least element (2) of the criteria was not met, (and plainly that is so, for if Berry's recanting testimony is true, Vaszorich knew at all times that Berry and not he wielded the steel worker's wrench, and the evidence was thus not newly discovered at all), and also upon his disbelief of the recanting testimony, stating: "It is amazing but at the same time regrettable that a young man of the age of seventeen years by the name of Berry should have so completely and so soon in life lost his soul. When I compare the statements now made by Berry with his sworn testimony under oath and his statement to the Court when the imposition of sentence was given, I cannot come to any conclusion other than to say that it is unbelievable, and I do not believe it. If he is now telling the truth in his affidavit, he is guilty of perjury."

We have no difficulty whatever in reaching the conclusion that the argument by Vaszorich that Judge Giordano did not properly exercise his discretion is wholly without substance. Berry had nothing to lose by recanting; he was content with having escaped the death penalty and did not appeal. His life not being forfeit, nor could it be, he plainly perjured himself, obviously from some twisted sense of loyalty to his companion in depravity.

The judgments on appeal are affirmed.

WACHENFELD, *J.* (Dissenting)

The killing was vicious, cruel and bloody and the gruesome details need not be recited further than to say that death was the result of an assault and robbery and under the statute was murder in the first degree.

But the constitutional guarantees of a fair trial are not impaired by the abundance of evidence against the accused, nor is the law to be altered or the trial errors condoned or excused because of evident guilt if in fact they resulted in manifest wrong and injury.

I am in accord with the majority opinion except as to two points. I think there was error in the return of the verdict, which was a nullity for failure to comply with the statute by reciting the degree of murder of which the defendants were convicted, and in the distribution of the so-called "blue book" with the legend set forth therein.

It is not disputed that three of the jurors in the Vaszorich case, when polled, upon being asked to declare their verdict, merely responded: "Guilty, with no recommendation," without specifying the degree of murder as required by the statute. As to Brown, six jurors, when polled, replied: "Guilty, with a recommendation of life imprisonment."

The statutory requirement as to the way and manner such verdict must be returned is found in N.J.S. 2A:113-2: "A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree."

This court, in *State* v. *Cooper,* 2 N. J. 540 (1949), said it was "*imperative* in its command," "it was a *solemn obligation* * * * in a matter of the *utmost gravity,*" "the

legislature deemed it essential that in resolving an issue involving the death penalty or life imprisonment the finding be specific and not left to conjecture."

In *State* v. *Cleveland,* 6 N. J. 316 (1951), the unanimous court repeated:

> "The question involves more than a technical violation of a statute or a rule of procedure. The finding must be specific and in *exact accord with the statutory mandate.*"

The same forceful language was used four months ago in *State* v. *Greely,* 11 N. J. 485 (1953):

> "It is the duty of the jury to find a verdict in compliance with the statutory mandate and the *degree of murder of which the defendant is guilty is a specific prerequisite.*"

The majority opinion concedes that under the statute "it is imperative that the jury shall * * * designate by their verdict whether it be murder in the first degree or in the second degree." It admits that on the poll the jurors failed to specify the degree of murder, but with seeming inconsistency then sustains the verdict because the failure of the jurors to specify the degree of murder was due to "momentary inadvertence" and their conduct did not evince a lack or "fixed intent" and concludes that "the inference necessarily suggested by the recommendation * * * may show individual concurrence in a correct verdict.* * *"

In other words, inferences can be drawn as to what the jurors meant or intended and their failure to comply with the statute is to be excused because of "momentary inadvertence."

In *State* v. *Cleveland, supra,* however, we said just the opposite:

> "Such determination cannot be left to inference. The finding must be specific and in exact accord with the statutory mandate."

And then to dispel any doubt as to this rule's application in a poll of the jury, we said:

> "We think the law clearly demands that when a jury in a murder case is polled, each juror, if he finds the defendant guilty, shall designate by his verdict whether it be murder in the first degree or in the second degree.
>
> "This was not done in the case under consideration, and we think it constituted prejudicial and therefore reversible error."

It was not new law, for in *State* v. *Cooper, supra,* we said it is "essential that in resolving an issue involving the death penalty or life imprisonment the finding be specific and not left to conjecture."

Then to make "assurance doubly sure," in *State* v. *Greely, supra,* we said compliance with the statutory mandate as to the degree of murder was a "specific prerequisite."

To me the factual situation here is identical. The Constitution is the same; the statute still remains in full force and effect on our books. The only difference is that Cleveland, Cooper and the others have been disposed of and Vaszorich and Brown are answering at the bar of justice. The rule as to them is different; it has been changed and Vaszorich's death is decreed with little thought to the standards applied by us to others under the same circumstances.

No tribunal, high or low, has the right to take life without strict compliance with the legislative and constitutional mandates permitting it, nor is the judicial reasoning of such substance, quality or stability as to be an adequate substitute for the enacted provisions.

The comforting faith in the equality of the criminal law and its impartial administration may well totter under the impact of the attempted distinction here made. My bewilderment lies in my inability to reconcile the inconsistent treatment and results arrived at under the same law.

Also, there was distributed to the entire panel of prospective jurors a so-called "blue book" of 28 pages, entitled "Primary Instructions to Jurors," containing this statement: "Facts and Principles with Which Every Juror Should Make Himself Familiar." It had printed on its face in large letters, "Compliments of the Sheriff." This advertisement admittedly had many errors not disputed by the majority opinion, including an improper definition of reasonable doubt quite contrary to what was ultimately charged by the trial judge. The booklet was given to the jurors without authority of any court, and they had it in their possession for four or five days. The concluding page of this catalogue of misleading "facts and principles" was devoted exclusively to this admonition, prominently and impressively displayed:

> "On the head of the criminal lies the crime; but in a miscarriage of justice the jurors delinquent become participants of guilt." Lycurgus

History tells us that the author's Spartan leadership existed in the Ninth Century B.C. His qualifications for instructing our jurors in this jurisdiction and in this age are absent from the record.

On oral argument, the Prosecutor honestly and freely admitted this quotation was not good law and he did not even undertake to defend it. That was left to us as another judicial chore if we would sustain the judgment below.

Realistically, this coined phrase trampled upon the constitutional privileges of the defendants and annihilated

their rights by denying to them the presumption of innocence and the requirement that the prosecution prove its case beyond a reasonable doubt. It replaced these two fundamental principles, constituting the very foundation of our criminal law, with a threat that unless there was a verdict of guilty, the jurors who asserted their independence, did their own thinking and followed the law would themselves be guilty of a crime.

A greater trespass upon the primary rights of the prisoners is difficult to conceive. We have humbly said: "A thing in writing carries, particularly with the layman, a weight of its own," and such an incident "shears the balance of the oral testimony in the case of the weight it would otherwise have and is erroneous." *State* v. *Cleveland, supra.*

The gravity of the situation was recognized by the trial court when, referring to the booklets, it said they "might be misleading when in the hands of laymen who know nothing about the law" and therefore ordered that the books be taken from the jurors. However, this action and what was said by the court were obviously ineffective as a cure for an error so prejudicial and glaringly defiant of our concept of essential and fundamental justice.

The harm occasioned by the written erroneous instructions as the guide by which the jurors were to determine the fate of the defendants, absorbed by and impressed upon them by having physical possession of the erring document for days, could not be overcome that easily. "A thing in writing carries a weight of its own" and a nullification of its imprint under the admitted circumstances is difficult of accomplishment.

The solemnity of the method of taking a verdict in a first-degree murder case as required by the statute has been in existence for 35 years, *State* v. *Turco,* 98 N. J. L. 61

(Sup. Ct. 1922), and has been confirmed by this court on three different occasions within the last few years in strong and unequivocal language; yet the majority sees a difference in the case *sub judice* which I am unable to discern.

In effect, it changes the law, and if a change is to be made, we should at least recognize the right of the legislature to make it instead of usurping its prerogative. Here in substance we now refuse to enforce a legislative directive which we have already upheld and termed a "solemn obligation," "imperative in its command," of the "utmost gravity," and which the courts have supported since its enactment in 1917.

Apparently we do not mean what we said a few months ago no matter how emphatically or plainly we expressed it. In fact, we have just changed our mind and that, it seems, should be sufficient, but Vaszorich is going to have difficulty understanding it.

His treatment is contrary to the standards heretofore unanimously agreed upon and accorded to others. I doubt if my difficulty is due to my lack of experience in criminal matters. Nevertheless, my analysis of the issues involved, with the pronounced authorities, compels me to conclude that the death warrant here, when issued, must be classified as "expedient" rather than "legal."

I would reverse as to both defendants.

Mr. Justice Heher and Mr. Justice Burling concur in this opinion.

Order on Petition for Recall of Mandate

It appearing from the petition of the defendant-appellant that an application is about to be made by him to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court, entered on June 22, 1953, affirming the conviction of the defendant-appellant in the Monmouth County Court for the crime of murder in the first degree; and good cause appearing;

It is ORDERED that the Mandate heretofore issued out of this Court be recalled and be held for a period of sixty days pending the application for certiorari to the United States Supreme Court;

And it is further ORDERED that the sentence of death heretofore imposed upon the said defendant-appellant be stayed pending the determination by the United States Supreme Court of the application for a writ of certiorari.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton this 15th day of July 1953.

CHARLES K. BARTON,
Clerk

A True Copy

CHARLES K. BARTON,
Clerk

Filed
Jul 15 1953

CHARLES K. BARTON
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953

JOHN LOUIS VASZORICH,

Petitioner-Appellant,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF OF APPELLANT, JOHN LOUIS VASZORICH

I.

Opinions of the Court Below

The opinions of the New Jersey Supreme Court are found in *State* v. *Vaszorich; State* v. *Brown,* ——— N. J. —— (not yet reported) and are set forth at length herein, attached to and made a part hereof (pp. 28-63).

II.

Jurisdictional Statement

1. The date of the judgment to be reviewed is June 22, 1953. An order recalling the mandate of the New Jersey Supreme Court and staying the sentence of death was signed by the New Jersey Supreme Court on July 15, 1953.

2. The statutory provision which sustains the jurisdiction of this court is Title 28, U. S. C. A., Sec. 1257 (3).

3. The nature of the case, the rulings below and statement of facts and references thereto in the record to bring this case within the jurisdictional provision relied on have been set forth and are stated in the preceding petition for review by certiorari under I (pp. 1-4), under II (pp. 5-7), under II (b) (pp. 8-23), which are hereby adopted and made a part of this brief.

4. The cases believed to sustain said jurisdiction are as follows:

Avery v. *State of Alabama,* 60 S. Ct. 321, 308 U. S. 444;
Betts v. *Brady,* 316 U. S. 455-480, 86 L. Ed. 1595, 62 S. Ct. 1252;
Chambers v. *Florida,* 309 U. S. 227, 60 S. Ct. 472;
Hopt v. *People of Utah,* 110 U. S. 574, 4 S. Ct. 202;
Lisenba v. *Cal.,* 314 U. S. 219, 236, 62 S. Ct. 280;
Ochoa v. *U. S.,* 167 Fed. Rep. 2d 341;
Palko v. *Conn.,* 302 U. S. 319, 58 S. Ct. 149;
People v. *Schoos,* 399 Ill. 527;
People v. *Weatherford,* 160 P. 2d 210 (aff. 27 Cal. 2d 401, 164 P. 2d 753);
Rochin v. *California,* 342 U. S. 165, 96 L. Ed. —, 72 S. Ct. 205;
Snyder v. *Mass.,* 291 U. S. 97, 78 L. Ed. 674, 54 S. Ct. 330;
State v. *Cooper,* 2 N. J. 540;
State v. *Cleveland,* 6 N. J. 316;
Turner v. *Pa.,* 338 U. S. 62, 69 S. Ct. 1353;
Ward v. *Texas,* 316 U. S. 547, 62 S. Ct. 1139;
Watts v. *Indiana,* 338 U. S. 49, 69 S. Ct. 1357.

III.

Statement of the Case

1. This has already been stated in the preceding petition for review by certiorari under I (pp. 1-4) of said petition which is hereby adopted and made a part of this brief.

IV.

Specification of Errors

The Supreme Court of the State of New Jersey erred in holding that:

(a) Petitioners rights were not violated by the exposure of the jury panel to incorrect booklet instructions before trial and out of the presence of the accused;

(b) Petitioners rights were not violated by forcing the trial into overtime and evening sessions to the exhaustion of counsel;

(c) Petitioner was not denied a fair trial by the trial courts prejudicial remarks to defense counsel upon his opening;

(d) There was no denial of due process in the admission of the confession extracted from petitioner into evidence;

(e) Petitioner did not suffer injury by the remarks of the prosecutor in summation, which remarks did not concern evidence adduced;

(f) The return of the verdict did not violate the statutes and rules made and provided but was the result of momentary inadvertence on the part of some members of the jury.

ARGUMENT

Summary of Argument

POINT A—The petitioner's constitutional rights and privileges were annihilated by the issuance to the jury panel of an incorrect and inflammatory booklet of instruction, in his absence, which denied the petitioner his right to be present at every stage of the trial, denied him of the presumption of innocence and the requirement that the prosecution prove its case beyond a reasonable doubt and subjected the entire panel to prejudicial matter.

POINT B—The Court, in forcing the trial into overtime and evening sessions over the objection of exhausted counsel precluded the petitioner from his full rights of representation of counsel.

POINT C—The Court denied the petitioner a fair trial by demanding counsel state his defense in his opening, which is not required by the Rules of Court and by using language which of necessity had to effect the jury, which is contrary to the very fundamentals of justice in the Anglo-American tradition.

POINT C—The Court admitted a statement, inculpatory in nature, into evidence, which statement had been wrung from petitioner in disregard of the due process of law and the Rules of the Courts of the State of New Jersey.

POINT E—The prosecutor was allowed to comment upon facts not in evidence and of a highly prejudicial nature which denied the petitioner a fair trial and struck at his fundamental rights.

POINT F—The Court accepted a verdict, which was in fact a nullity, by reason that it did not conform to the statutory mandate and denied your petitioner the same

rights accorded others and protection under the statute which was provided by the legislature so that life might not be forfeit without strict compliance with the correct procedure.

POINT A.

There was a denial of due process in the conviction of your petitioner and a denial to him of those basic principles of justice so rooted in the traditions and the conscience of our people so as to be ranked as fundamental. The panel of jurors was permitted to be exposed to an incorrect booklet of instructions, which instructions were absolutely foreign to all fundamental principles of law, and subjected your petitioner to a deprivation of his rights without due process of law.

The due process clause of the 14th Amendment requires that action by the State, through any of its agencies, must be consistent with the fundamental principles of liberty and justice. Where this requirement has been disregarded this Court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. The rulings of the trial court and the findings of the jury do not foreclose the duty of this court to study the record and make an independent examination and judicial review to determine the constitutional validity of the conviction and to exercise its judgment upon the whole proceedings to ascertain whether they offend those canons of decency and fairness which express the notions of justice even toward one charged with the commission of homicide.

Under Article 1, Section 1, 10 of the New Jersey Constitution (1947), all persons have certain natural and unalienable rights of enjoying and defending life and liberty and of the pursuit of happiness, and in all criminal prosecutions the right to have a speedy and public trial

by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses, and to have the assistance of counsel in his defense; which rights are set forth in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In re Palko v. *Conn.*, 302 U. S. 319, 58 S. Ct. 149, Mr. Justice Cardozo stated the rule to be that:

> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, but in so doing it must not offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law."

In the case *sub judice* the entire panel of prospective jurors were distributed a pamphlet entitled "Primary Instructions to Jurors" (D14a). This "masterpiece" contained a multitude of misstatements of law and of at least one prejudicial quotation, and among them were the following:

> "Q. What is a reasonable doubt? A. The term 'reasonable doubt' carries with its own explanation. It is just what the words imply: a doubt founded upon reason. It does not mean any doubt whatever, but is such a substantial doubt arising in the mind of a reasonable man after a careful review and consideration of all the evidence, or the lack of evidence in the case, that produces an uncertainty and no abiding conviction of the defendant's guilt. A reasonable doubt is one for which, should he be called upon, a juror can give a reason. It is not a guess or a whim, nor is it a surmise that for some unknown reason the defendant may be guiltless, nor is it a subterfuge that may be resorted to to avoid the doing of a disagreeable duty. A reason must support the doubt." (Appendix 5a)

Furthermore, the concluding page of these booklet instructions contained one item sc prominent that it could not be missed:

> "On the head of the criminal lies the crime; but in a miscarriage of justice the jurors delinquent become participants of guilt." Lycurgus. (Appendix 5a)

In his dissenting opinion in this cause while before the New Jersey Supreme Court, Justice Wachenfeld had this to say:

> "History tells us that the author's Spartan leadership existed in the Ninth Century B. C. His qualifications for instructing our jurors in this jurisdiction and in this age are absent from the record.
>
> On oral argument, the Prosecutor honestly and freely admitted this quotation was not good law and he did not even undertake to defend it. That was left to us as another judicial chore if we would sustain the judgment below.
>
> Realistically, this coined phrase trampled upon the constitutional privileges of the defendants and annihilated their rights by denying to them the presumption of innocence and the requirement that the prosecution prove its case beyond a reasonable doubt. It replaced these two fundamental principles, constituting the very foundation of our criminal law, with a threat that unless there was a verdict of guilty, the jurors who asserted their independence, did their own thinking and followed the law would themselves be guilty of a crime.
>
> A greater trespass upon the primary rights of the prisoners is difficult to conceive. We have humbly said: 'A thing in writing carries, particularly with the layman, a weight of its own,' and such an incident 'shears the balance of the oral testimony in the case of the weight it would otherwise have and is erroneous.' *State* v. *Cleveland, supra.*"

In *State* v. *Vaszorich,* — N. J. — (not yet reported). Dissent, Wachenfeld, J., the words of Justice Wachenfeld, concurred in by two of his brethren of a 7 man court, displays the violent reaction of the Justice to the cavalier treatment of the Constitutional rights of this defendant, no matter how grievous the crime or how secure the State's proofs.

The cases unearthed by your petitioner support his contention before this court that he has been deprived of the constitutional guarantee of fundamental fairness and the due process of law by the exposure of the jury panel to this inflammatory and prejudicial booklet.

In *People* v. *Schoos,* 399 Ill. 527, 78 N. E. 2d, 245, the Court decided, in reversing a conviction of armed robbery, that where a pamphlet containing statements likely to mislead laymen as to instructions relative to reasonable doubt (as here) and the credibility of witnesses, accessories, accomplices, alibies and confessions, it was held that the facts were prejudicially erroneous to one convicted of a crime because of statements in the pamphlet likely to mislead laymen. And the court said as follows:

> "The jury system has obtained a common law with but few and relative modifications over a long period of time—not merely for many years, but through the centuries—has proved the most effective instrument as yet devised to obtain substantial justice in the trial of the criminal cases we are reaching changes of institution which has served so admirably and so long should not be made lightly. True, the jury system is not perfect but no perfect system to replace it has been suggested. If changes are to be made extreme care should be exercised to make certain that the modifications proposed actually result in marked improvement in the functioning of the jury system rather than tend to impair its present effectiveness."

In *People* v. *Weatherford* (1945 Calif. Appellate), 160 P. 2d 210 (affirmed 1945, 27 Cal. 2d 401, 164 P. 2d 753) the defendant's conviction in the trial was reversed and the cause was remanded for a new trial. Among the defendant's complaints was one to the effect that the court erred in giving instructions to the jurors in advance of the trial and outside the presence of the defendant and his counsel. The booklet in question contained 15 printed pages and was entitled "Panel Instructions concerning the duties and responsibility of trial jurors in the criminal departments of the Superior Court of Los Angeles County, California. Read and study carefully." The Court said as follows:

> "In this case the pamphlet instructions are before this court. They are not a mere short summary of the general duties of jurors, but detailed instructions on matters of law; they were apparently not seen by defendant or his counsel, nor were they given in defendant's presence. * * *
>
> "The empaneling of a jury is an important step in the trial itself, and the error in question is subject to consideration on an appeal from the judgment of conviction. The fact that the same jury panel may be employed in the trial of various cases during the period of jury service, does not affect the right of a defendant in a particular case to full compliance with the constitutional provisions; the impaneling of the jury in the first instance is as much a stage in the proceedings as the drawing of the jury on the day of trial. Ordinarily, the first appearance and selection of a jury panel is more or less perfunctory and the routine limited to but one function. Where, however, that routine is departed from and the panel is given general instructions that may or may not be appropriate in succeeding trials for which members of the panel may be chosen, an entirely different situation is presented. That prejudicial error could, and might be likely to, result from such practice, there can be no question. And this is especially true where pamphlets are so distributed.

> "The law contemplates for a defendant in a criminal action, a jury of his 'peers' and not his betters or superiors, actual or presumed. The distribution of such pamphlets to a jury panel, however well intended, is not authorized by the law. Manifestly, such instructions given under the apparent authority of the court would be regarded as binding when, as a matter of law, the only binding instructions are those given at the trial. The defendant's counsel in a criminal action cannot be expected nor required to uncover prejudice resulting from such procedure. And to regard such a practice trifling is to ignore the basic doctrines of criminal jurisprudence.
>
> "The due process provision of the 14th Amendment bears no resemblance to mere procedure. The right of the defendant in a criminal action to be present at all stages of the proceeding has been uniformly upheld.
>
> "In the light of the record it must be held, as a matter of law, that the error referred to materially and adversely affected the substantial rights of the defendant."

In *People* v. *Fisher* (1930), 340 Ill. 216, 172 N. E. 743 the trial judge gave the jury instructions on voir dire, oral instructions concerning the law, the court said in substance that such practice on the part of the trial court is not to be commended.

In *Williams* v. *State,* 1921, 89 Tex. Crim. 334, 231 S. W. 110, after the jury was empaneled, and otherwise proceeding with the trial, the trial judge gave certain instructions to the jury which were objected to. The appellate court observed

> "The practice of lecturing the jury is always fraught with the danger that either the language or the motive of the court may be misconstrued."

In *Thomas* v. *State* (1924), 97 Tex. Crim. 432, 262 S. W. 84, the defendant objected to a lecture by the court to the

jury in the course of which he said things calculated to impress upon the jury's mind it was their duty to convict. The Court of Appeals remarked:

> "The presence of matters of this kind in the record and the conflicting form in which same appeared cause this court much trouble. These can easily be avoided by omitting such lectures to the jury."

The majority of opinion in this cause when it was decided by the New Jersey Supreme Court, *State* v. *Vaszorich*, —— N. J. —— (not yet reported), freely admitted that the booklet contained a completely erroneous definition of reasonable doubt and the challenged quotation of Lycurgus, but slips around the violation of your petitioner's constitutional rights by stating that the circumstances surrounding the discovery of the book, the withdrawal of the same from the panel by the trial judge after discovery and the failure of your petitioner's counsel to move for a mistrial, that the court may well be justified in concluding that counsel did not view the situation as serious enough to call for the break up of the trial and that the judge's instructions at the conclusion of the case was sufficient to protect your petitioner's rights. The dissenting opinion by Justice Wachenfeld shows with what contempt he viewed the reasoning of the majority. A more bitter dissent has not been viewed in all the research and experience of counsel for the petitioner.

In *Twining* v. *New Jersey*, 29 S. Ct. 14, 211 U. S. 78, 53 L. Ed. 107, the Court described in general the meaning of due process with regard to criminal matters as follows:

> "... This court has never attempted to define with precision the words 'due process' of law '. . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *Holden* v. *Hardy*, 169 U. S. 366,

389, 42 L. Ed. 780, 790, 18 Sup. Ct. Rep. 383, 387. 'The same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *Re Kemmler,* 136 U. S. 436, 448, 34 L. Ed. 519, 524, 10 Sup. Ct. Rep. 930, 934. 'The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.' *West* v. *Louisiana,* 194 U. S. 258, 263, 48 L. Ed. 965, 969, 24 Sup. Ct. Rep. 650, 652."

In the case at bar, the effect of the jury being exposed, at a time when their instructions and their minds were in the formative stage, to this highly prejudicial and legally incorrect booklet of instruction was to deprive the petitioner of being present at every stage of the trial. This deprived him without question of "due process of law." In *Snyder* v. *Massachusetts,* 291 U. S. 97, 78 L. Ed., 319, 54 S. Ct. 330, 90 A. L. R. 575, the Court held that the presence of a defendant is a condition of due process under the Fourteenth Amendment to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. Said Justice Roberts in dissenting in the *Snyder* case: ". . . Speaking generally of the administration of criminal justice throughout the nation, this court has said: 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner; . . .' and stated further: 'In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule.' "

A jury must be drawn in the defendant's presence in order that he might have an opportunity to examine their qualifications and the jury is then closely guarded in order that they may not obtain any extraneous matter or hear the same until the instructions are delivered to them by the court at the conclusion of the cause. This is fundamental and hornbook law. The prisoner here was denied a free and unbiased jury. They had been instructed, incorrectly and prejudicially, before the cause opened. It is significant to note that the booklet instructions were not issued by the authority of any court, but was an advertisement, actually, issued by the Sheriff of Monmouth County to the entire panel. It is doubly significant to note that the existence of these booklets was not even known by either court or counsel until part of the jury had been selected. A fundamental and primary right of this citizen had been trespassed upon. See too: 16 Corpus Juris 813.

In *Betts* v. *Brady*, 316 U. S. 455-480, 62 S. Ct. 1252, this Court had the following to say regarding "due process":

> ". . . The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed . . ."

In New Jersey, the presence of the accused at every stage of the trial is mandatory according to Rule 2:10-2 of the Rules of Criminal Practice of the Courts of the

State of New Jersey. When these books were issued by the Sheriff to the panel and read by the members thereof, your petitioner was denied this fundamental right. This Court in *Hopt* v. *People of Utah*, 110 U. S. 262, 264, 4 S. Ct. 202 held that where there was a like provision in the Criminal Code of Utah then existing required the presence of the defendant at the trial, his absence during challenges to the triers, was prejudicial error. The case states in substance that the prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors.

In the instant case, when the panel was issued these booklets, the defendant was not only himself absent, but of course, was not represented.

It is therefore respectfully submitted that a fundamental right of the defendant was trespassed upon here and he was denied a fair trial within the intendment of due process of law.

POINT B.

The trial Judge erred in the prejudice of the defendant in forcing the trial into overtime and evening sessions, therefore causing the defendants to be precluded from having a fair and impartial trial and actually denying them representation of counsel.

This was a long, arduous and protracted trial, and it came unfortunately and ironically prior to the Christmas season. The voir dire consumed nearly three weeks. The tension ran unabated throughout every minute of the trial. Nerves were unstrung and counsel haggled. The Court's patience was worn thin and ultimately one of the defense

attorneys broke down (D777a). Nevertheless, the trial judge made it clear to all concerned that his primary effort in these proceedings was to conclude them. He ordered the trial continued into evening sessions despite bitter objection of each defense counsel (D109a *et seq.*). It must be clear that the trial judge's enthusiasm for expedition of the disagreeable affair resulted in an overtaxing of the defense counsels' physical capacities and precluded these three young men, and more particularly the defendant Vaszorich, from having a fair and impartial trial and in truth, actually denying him representation by counsel. Representation by counsel not only means assignment of counsel but opportunity for due preparation and a chance for zealous and proper representation. See: *Avery* v. *State of Alabama,* 60 S. Ct. 321, 308 U. S. 444, 84 L. Ed. 377.

The General Rules of Administration for the Courts of the State of New Jersey provide in Rule A-1 that the Courts shall sit from 10 a.m. to 1 p.m. and from 2 p.m. to 4 p.m. unless the Chief Justice shall order otherwise. The wisdom of this rule is immediately apparent. During especially a capital case, counsel are heavily taxed and the swiftness of justice must never infringe on the protection of individual rights. In *Amo* v. *Genovese,* 17 N. J. Super. 109 (1951) the court attacked a proceeding where the expediting of judicial business was accomplished at the expense of justice. The court stated as follows:

> ". . . It is exceedingly desirable, if not imperative, that in the disposition of the modern quantity of litigation, expedition must supplant languor, but never at the expense of justice . . ."

In *Pepe* v. *Urban,* 11 N. J. Super. 385, 389, the Court stated:

> "We must never forget that courts exist for the sole purpose of rendering justice according to law. No eagerness to expedite business, or to utilize fully the court's time, should be permitted to interfere with

> our high duty of administering justice in the individual case."

The trial court stated that he had "permission" of the Chief Justice to take these proceedings into night sessions (D109a). However, Rule A-1 states unequivocally that court time shall not be extended "unless the Chief Justice shall order otherwise." The record is barren of any written order signed by the Chief Justice.

> ". . . Nevertheless, the trial should not be unduly speeded, and it is important that there should not be haste at the expense of justice, especially where life or liberty is at stake." 23 Corpus Juris Secundum, Section 961, page 282.

POINT C.

The trial Judge's remarks to defense counsel upon his opening were unnecessary, incorrect, prejudicial to the defendant and precluded his fundamental right to a fair trial.

During the course of the opening of counsel for the defendant Vaszorich, the Prosecutor objected to certain remarks made by the said defense counsel, and the court joined in the objection and rebuked the said defense counsel (D29a). The colloquy, which deserves to be reproduced here, was as follows:

> "Mr. Frankel: If the Court please, I don't want to interrupt counsel, but I object to the philosophizing that counsel is about to undertake when he starts speaking of what Mr. Strauss, one of the prospective jurors, said from the stand the other day.
>
> The Court: Yes, I was going to interrupt you, but I didn't think I would do it. Now, the purpose of an opening is to tell this jury what your defense is if you have got one. Go ahead.
>
> Mr. Juska: Well, I respectfully take objection to your Honor's remarks.

The Court: If you have a defense, tell the jury what it is.

Mr. Juska: I let my friend go to some extent, as your Honor knows, without interrupting him.

The Court: Well, I don't want to interrupt you, Mr. Juska, but I am not going to sit here and permit you to harangue on a lot of philosophies that probably will never be proven in this case. Now I think you should be limited, and I admonish you, all of you, limit yourselves to tell this jury what the defense is to the accusation. You plead not guilty, and that in itself should be a sufficient opening, but go ahead. I don't mind your talking, but tell us something about the defense. I would like to know that.

Mr. Juska: Shall I proceed?

The Court: Go ahead."

At the conclusion of the opening the following took place:

"Mr. Frankel: Now, if the Court please, I again must rise and ask counsel to state his defense.

The Court: Yes.

Mr. Frankel: That is the purpose of his opening. He has used a lot of words and said nothing.

The Court: That's true.

Mr. Frankel: And I would like to know what his defense is.

Mr. Juska: Now, sir, I ask for the record to show that even a person who is looking for the minutest bit of law or fact in the case, such as my friend is, and of course as he has a perfect right to look for, anybody, including a graduate of grammar school, which my client is not, a graduate of a high school, which my client is not, can find in my opening statement a plea of not guilty. That is what it is. We are not guilty at this stage of the proceedings, and that is my plea.

The Court: Well, thank you for stating it. You have not stated it up to this moment.

Mr. Juska: I object to that remark by the Court.

The Court: That's true. I asked you to do it, and I admonish you to do it when I interrupted you and asked you to state your defense, which you

didn't do until this very moment, and I thank you for stating it. Go ahead Mr. O'Hagen."

That these remarks of the trial judge were unnecessary goes without question. Every direction and remark from the bench should have been closely guarded. The minds of the jurors are quickly swayed by any indication from the bench.

The trial judge's remark was without doubt incorrect. Rule 2:7-3 of the Rules of Criminal Practice of the Criminal Courts of the State of New Jersey, provide for an opening in a criminal cause but by no means makes it mandatory. In *State* v. *Craig,* 9 N. J. Super. 18, 22, it was held that an opening to the jury by the defendant was not required and stated that the better practice was for the Court to refrain from questioning counsel on the opening.

In *Marino* v. *Cocuzza,* 14 N. J. Super. 16, 22, the Court collected a great number of authorities which outlined the necessity for the correct, proper and impartial attitude the court must maintain at all times. Among them was this admonition: "The judge * * * is the governor of the trial for the purpose of assuring its proper conduct and the fair and impartial administration of justice between the parties to the litigation" 53 Am. Jur. Trial, sec. 74, p. 73. "The trial judge occupies a high position. He presides over the trial. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word. It is therefore imperative that the trial judge shall conduct himself with the utmost caution in order that the unusual power he possesses shall not be abused. *State* v. *Wheat,* 131 Kan. 562, 292 Pac. 793 . . ."

Of course, these remarks by the court appear now only in the cold black and white on the record. It is unfortunate that the manner and tone in which they were delivered

cannot be reproduced for review. Nevertheless, the colloquy clearly shows trespass upon the defendant's rights to a fair trial. See the definitive treatment of "due process" as exemplified in *Rochin* v. *California* (1952), 342 U. S. 165, 96 L. Ed. —, 72 S. Ct. 205, 25 A. L. R. 2d 1936.

". . . Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses . . ." *Malinski* v. *State of N. Y.*, 342 U. S. 401, 65 S. Ct. 781 (1945).

POINT D.

The "confession" of John Louis Vaszorich was involuntary, obtained in violation of his rights, and its admission into evidence violated the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The alleged confession of the defendant, John Vaszorich, was not voluntarily given. The defendant was nineteen years of age. He was arrested at his home, where he lived with his mother, on the first day of October, 1951 (D601a) and he gave the statement which was admitted into evidence on the fourth day of October, 1951 (D649a). From the time he was picked up in the evening of the first day of October, until he gave this statement, he was questioned for hours on end every day by waves of inquisitors; was taken in and out of cells; was moved around to various police headquarters throughout the County and to the jail at Freehold; was taken out by detectives to look for various items allegedly used in connection with the crime; was

taken to a state psychiatrist; was given very little food at irregular hours and in general, every psychological trick and pressure was applied by police authorities of various municipalities, by detectives attached to the Prosecutor's office and by the Assistant Prosecutor himself (D478a).

He had a hearing on the 2nd day of October. He does not remember at that time being advised of his right to obtain counsel. In fact, he denies it. One detective corroborates this. At no time during this period between arrest and the signing of the statement did he see a friendly face. It is not difficult to see why he signed a statement. The only odd thing about this situation was that he was able to hold out for so long without making a statement.

While it may be said that in New Jersey a confession does not become *ipso facto,* inadmissible in evidence because it was obtained during an illegal detention or because there was undue delay in taking the defendant before a magistrate in violation of Rule 2:3-3, the courts will give careful scrutiny to the conditions under which the statement was taken during the period of delay and the statement will only be admitted when it appears in fact to have been voluntarily made, *State* v. *Pierce,* 4 N. J. 252, 264 (Sup. Ct. 1950).

It cannot be said on the bare record itself that a statement given by a nineteen year old boy after hours and days of questioning, illegal detention, irregular meals, shifting from one police station to another and faced at all times by groups of questioning authorities, can possibly be voluntary. A conviction secured by such a compelled confession was held by the Supreme Court of the United States to be in violation of due process by law upon a like set of facts in *Chambers* v. *Florida,* 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (U. S. Sup. Ct. 1940), and again in *Ward* v. *Texas,* 316 U. S. 547, 62 Sup. Ct. 1139, 86 Law Edition, 1663 (U. S. Sup. Ct. 1942).

In *State* v. *Cooper*, 2 N. J. 540, the Court describing the underlying principle of our enforcement of criminal law stated it to be as follows:

> "Ours is the accusatorial as opposed to the inquisitorial system. * * * The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressure, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards. For while under that system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge in the presence of counsel." Watts v. State of Indiana, 69 S. Ct. 1347, 1357; Turner v. Commonwealth of Pennsylvania, 69 S. Ct. 1354, 1357. Harris v. State of South Carolina, 69 S. Car. 1354, 1357.

The court in amplifying the last cited case further stated the following:

> "In the case last cited, Justice Frankfurter said: 'Petitioner was not informed of his rights under South Carolina law, such as the right to secure a lawyer, the right to request a preliminary hearing, or the right to remain silent. No preliminary hearing was ever given and his confession does not even contain the usual statement that he was told that what he said might be used against him. During the whole period of interrogation he was denied the benefit of consultation with family and friends and was surrounded by as many as a dozen members of a dominant group in positions of authority. It is

> relevant to note that Harris was an illiterate. * * * The systematic persistence of interrogation, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances which invokes the same considerations which compelled our decisions in Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct.' ".

The confession in this case on its face shows itself to be a mockery of justice. It is a cross-examination, accomplished without the safeguards of the court room, by a highly intelligent, aggressive prosecutor. The "willing" subject was a teen-ager who had been the recipient of every police trick known short of physical abuse. The admissions therein as to an absence of threats and promises are a joke after the days of psychological whipsawing which had been applied.

Watts v. *Indiana,* 338 U. S. 49-62, 69 S. Ct. 1357, 93 L. Ed. 1801 (U. S. Sup. Ct. 1948) Frankfurter, J., still stands as the most compelling decision on this question. As was stated heretofore in more detail, after days of compulsion, the "confession" of Vaszorich, was extracted by the cross-examination method Mr. Justice Frankfurter in reference to this procedure in the *Watts* case, had this to say:

> "* * * To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, if so grave an abuse of the power of arrest as to offend the procedural standards of due process."

Instead of the police in this case applying their efforts in approved channels of investigation, they confined their activities to what seems to have been an all-out, concerted effort at prying some sort of a confession from Vaszorich. Again we must turn to *Watts* v. *Indiana, supra*:

> "* * * Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured, through skillful investigation. * * *"

It is plain from the record that the defendant, Vaszorich, was illegally detained from early evening of October 1st to the afternoon of October 2nd when he had a hearing before Judge Hurley in Ocean Township. There seems to be great doubt that the Magistrate even informed him of his right to obtain counsel. In the period between his arrest and the hearing he was, of course, subjected to heavy questioning, little food and much pressure. In *Watts* v. *Indiana, supra,* in a concurring opinion by Mr. Justice Douglas, it was stated as follows:

> "* * * The accused is wholly at their mercy. He is without the aid of counsel or friend; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw, as we did in Malinski v. New York, 324 U. S. 401, 89 L. ed. 102, 65 Supreme Court 781 and Haley v. Ohio, 332, any confession obtained during the period of unlawful detention, the procedure breeds coerce confessions * * *."

Another case, subsequent to *Watts* v. *Indiana, supra,* before the Supreme Court of the U. S., in which the facts parallel the instant case to a great extent, is *Turner* v. *Pennsylvania,* 338 U. S. 62-67, 69 S. Ct. 1352, 93 L. Ed. 1811 (Sup. Ct. 1949) Frankfurter, J., in which the suspect was interrogated on four consecutive days during which he was not permitted to see friends or relatives, and was not informed of his right to remain silent until after he had been under the pressure of a long process of interrogations and had actually yielded to it. The court decided that the confession was coerced, was not voluntary and the ac-

cused's rights under the due process clause had been violated.

Inasmuch as the defendant, Vaszorich's conviction rests primarily on his alleged confession, the admission into evidence of the statement was highly prejudicial and violative of the 14th Amendment of the U. S. Constitution.

The seriousness of the result of this extorted statement taken from the petitioner Vaszorich is displayed in the subsequent developments following the close of this trial. The defendant Berry, one of the three tried in this cause simultaneously, later wrote a letter to Edward F. Juska, attorney for Vaszorich, assuming responsibility for the killing (D948a). Counsel immediately went to the State Prison at Trenton, where he took the statements of Berry and Brown. Both statements, under oath, are set out in full on the record (D941a and D946a). Counsel then moved for a new trial on the ground that he had newly discovered evidence, which was denied (D938a). In his statement, Berry states that it was he who had chopped down the victim, and not the petitioner. Certainly, the statement of Berry, contradicts that statement of the petitioner which had been wrenched from him during the investigation of this case by the Monmouth County Prosecutor's Office.

In re: *Malinski* v. *State of N. Y.*, 324 U. S. 401, 65 S. Ct. 781 (1945), Malinski and Rudish were convicted of murder, conviction affirmed by Court of Appeals of New York. Malinski was arrested the morning of Friday, October 23, 1942. He was taken to a room in a hotel, stripped and kept naked until about 11 A. M. when he was allowed to put on part of his clothing. He was beaten by the police, but the police denied the beating. There were no visible signs, bruises or scars and Malinski made no complaint to the judge on arraignment. Thereafter, Malinski confessed, and he was allowed to dress. He was kept at the hotel for the next three days. He was questioned on the 24th, 25th,

26th, 27th. The confession was introduced at the trial. The trial court held a preliminary hearing on the voluntary character of the confession. The trial court charged the jury that the confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary. It was held that,

> "The judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict.
>
> "If the evidence alone is not sufficient to show that the confession was coerced the comments of the prosecutor placed it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were indefensible.
>
> "And so, when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial

judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty.

"And so, with every respect for the contrary views of the majority of the judges below and of some of my brethren here. I cannot escape agreement with the Chief Judge of the New York Court of Appeals and two of his associates that there was not in this case a fair trial of the issues vital to the determination of guilt or innocence. Considering the circumstances of Malinski's detention, the long and continuous questioning, the willful and wrongful delay in his arraignment and the opportunity that that gives for securing, by extortion, confessions such as were here introduced in evidence, the flagrant justification by the prosecutor of this illegality as a necessary police procedure, inevitably calculated to excite the jury—all these in combination are so below the standards by which the criminal law, especially in a capital case, should be enforced as to fall short of due process of law.

"In reviewing a state criminal conviction we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes. On the other hand, in the discharge of that duty we must give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in

the Constitution must not be too fastidiously insisted upon in the case of wicked people. Despite the fact that English criminal justice has serious inadequacies and lags behind some of our penological advances, it is undeniable that on the whole it is much more effective than ours. Yet there can be no doubt, as English parliamentary proceedings and the reports of the English Court of Criminal Appeals amply prove, that practices such as this record reveals are not there tolerated. See, for instance, Inquiry Regard to the Interrogation by the Police of Miss Savidge (1928), Cmd. 3147; 217 H. C. Deb. (5th ser. 1928), May 17, 1928, 1303 et seq. Whatever difference there may be between the situations in England and in this country in the task of law enforcement, it is intolerable to suggest that we cannot have effective law enforcement without conduct such as this record spreads before us. The notion that we must resort to such methods in order to check crime or to convict criminals has been rejected by those who have had most to do with the criminal law. After consideration of the problem, a committee of eminent lawyers reported this conclusion:

'The remedy for the ills which afflict the administration of criminal justice, whatever that remedy may be, will not be found in measures which violate law. Such expedients, so far from restoring health and vigor to the system, only aggravate and protract the disorder. Under our form of government the machinery of criminal justice depends for its force and efficiency upon the enlightened moral sense of the individuals to whom the public by their constitution and laws have temporarily entrusted its operation. And it is as unwise as it is unwarranted for these servants of the public to violate the constitution and laws in the vain hope of accomplishing, useful or beneficial results.'

Yearbook (1928) Association of the Bar of the City of New York, 235, 255.

"These were the views of three former United States Attorneys for the Southern District of New York and three former District Attorneys for New York County

whose experience and effectiveness as prosecutors would hardly countenance doctrinaire or sentimental views.

"Mr. Justice Rutledge, dissenting in part.

"However great the proof against him otherwise may be, under our system no man should be punished pursuant to a judgment induced wholly or in part by a coerced confession."

The use of the confession of Vaszorich herein is repugnant to "a fundamental fairness essential to the very concept of justice". *Lisenba* v. *Calif.*, 314 U. S. 219, 236; 86 L. Ed. 166, 179; 62 S. Ct. 280.

Here we are not concerned with hardened criminals familiar through experience with Courtroom procedures and the effect of confessions as in *Stein* v. *New York*, —— U. S. ——, 97 Law Ed. (Advanced pages 1007, 1023), —— S. Ct. ——, but was indeed the result of illegal detention, questioning by relays of inquisitors and the constant transportation from one jail and one set of police officials to another. This procedure violated the petitioner's rights under the due process clause, circumstances being those which have been steadily condemned through a long line of cases in the United States Supreme Court.

POINT E.

The defendant, Vaszorich, was prejudiced by that part of the summation of the prosecutor wherein comment was made upon facts not in evidence, thereby precluding him from obtaining a fair trial.

In the course of his summation, the Prosecutor referred to one John Dean, about whom he stated he offered a special session of the Grand Jury to the defense attorneys if they had "one iota of evidence to present against John

Dean to show any connection with this case" (D75a). He also stated that he took a statement from John Dean and showed it to counsel before the case started (D878a). This information was never admitted into evidence, and therefore the Prosecutor had not the right to comment upon it in his summation. Objection was duly made upon the record (D878a), and a request was also made to the court to instruct the jury to disregard these statements. The court stated that he would try to cover it in a general way concerning opening and closing statements (D879a). The court, in his charge, failed to do so, except in passing to state that arguments of counsel are not evidence (D880a). Exception was again taken by counsel to the court's charge because of his refusal to instruct the jury to disregard the subject comments by the Prosecutor which were previously objected to (D901a).

The summations of counsel in the closing of a case are their last chance to bring the points that they think are important before the jury; to underscore what they think most pertinent, and in general, to make certain that no stone has been unturned. Our system of jurisprudence recognizes this and permits those who are summing up the greatest liberty in their language and methods. However, there is a restriction, and that is that counsel must confine themselves to comment only upon the evidence adduced.

> "* * * And it is apparent that the court must exercise a right to control the discussions of counsel and keep within a legitimate comment upon the facts of the case, and prevent indecorous and irrelevant discussions * * *" Sullivan v. State, 46 N. J. L. 446, 447 (1884).

It is obvious that in the instant case the Prosecutor, in his zeal to convict, exceeded the rule as to fair comment upon the evidence when he spoke about a special session

of the Grand Jury and statements made by a person never produced at the trial.

This Court, some years ago, laid down the guiding rule for the prosecutor's action in a criminal cause when it stated as follows:

> ". . . As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape and innocence suffer. He may prosecute with earnestness and vigor * * * indeed he should do so but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. U. S., 295 U. S. 78, 55 S. Ct. 629 (1935).

It is obvious that the Prosecutor far exceeded his privilege of fair comment upon the evidence. The trial judge agreed. Nevertheless, although due objection was made, the prejudicial remarks were never erased nor cured by any definitive instructions, and the end result was that the defendants were prejudiced thereby.

POINT F.

The judgment of conviction should be reversed because, upon poll, three individual jurors did not designate the degree of murder in conformity with the statute and rule provided.

In its instructions to the Jury in the charge, the Trial Court instructed the jury that it could only find one of three possible verdicts, to wit: (1) that the defendants, or any one of them are guilty of murder in the first degree which would call for the death penalty; (2) that the defendants or any one of them are guilty of murder in the

first degree with a recommendation of life imprisonment, which is discretionary under the statute; (3) that the defendants or any one of them are not guilty (D893a).

The Court's charge therefore excluded the possibility of the jury finding the defendants or any one of them guilty of murder in the second degree or manslaughter. No instructions were given as to the necessity of the jury designating the degree of murder upon which it should decide.

The jury, through its forelady, thereupon rendered a verdict in which it found the defendant, John Louis Vaszorich "* * * guilty of first degree murder, with no recommendation" (D915a).

Counsel for the defendant, Vaszorich, thereupon requested, in conformity with Rule 2:7(d), a poll of the jury to discover the individual verdicts of the jurors (D915a). The Court thereupon requested the juror "* * * to render your own individual verdicts" (D915a).

During the poll which followed, the Clerk asked Juror #7, Marjorie Kielt, how she said individually with reference to the defendant, Vaszorich (D916a) and Juror #7 replied "Guilty, with no recommendation" (D916a).

Further in the conduct of the poll the Clerk asked Juror #11, Charles D. Green, how he said individually with reference to the defendant, Vaszorich (D917a) and the Juror replied "Guilty, no recommendations" (D917a).

Also during the poll, the Clerk asked Juror #4, Bessie L. McIntyre, how she said individually with reference to the defendant, Vaszorich (D916a) and Juror replied "Guilty of murder, without recommendation" (D916a).

These stated replies display a verdict on the part of the three jurors individually that they made no designation of the degree of murder involved.

It is now well settled under the recent decision of *State* v. *Greeley,* 11 N. J. 485 (Sup. Ct. 1953), Wachenfeld, J. that it is the duty of the jury to find a verdict in compliance with the clear statutory mandate found in the then applicable statute R. S. 2:138-2 which reads as follows:

> "Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery or sodomy, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree."

In *State* v. *Cooper,* 2 N. J. 540 (Sup. Ct. 1949) Heher, J. on page 548 the Court stated as follows:

> "One cannot be put to death for homicide unless there has been a verdict by a jury, after trial of the issue in the constitutional mode, establishing in a specific term his guilt of murder in the first degree. This is a peremptory statutory direction. It is provided that murder perpetrated 'by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery or sodomy, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree' R. S. 2:138-2. And it is further provided that every person 'convicted of murder in the first degree', his aiders, abettors, counselors and procurers, shall suffer death unless

> the jury shall 'by its verdict, and as a part thereof, upon and after the consideration of the evidence', recommend life imprisonment in which event no greater punishment shall be imposed R. S. 2:138-4. * * *"

The State's theory in the case at bar, as in the case of *State* v. *Greeley, supra,* was that the alleged murder was committed in a perpetration of a robbery, as the Court so instructed the Jury (D883a and following).

The most compelling case to support the defendant-appellant's contention is without doubt *State* v. *Cleveland,* 6 N. J. 316 (Sup. Ct. 1951), Wachenfeld, J. where the foreman in rendering the verdict for the jury found the defendant guilty of murder in the first degree, but upon poll the individual jurors did not designate the degree of murder. The Court said that in Rule 2:7-9(a) it is mandatory for the verdict to be unanimous and Section (d) of the same rule provides for a polling of the jurors, and if there is not a unanimous concurrence the jury may either be directed to retire and further deliberate, or may be discharged. The Court went on to say the practice of polling the jury is one intended to create individual responsibility and to eliminate uncertainty. The Court again reiterates that the verdict is defective and fatally so if the degree of murder is not designated and no judgment can be legally pronounced thereon.

In *State* v. *Cleveland, supra,* the State argued that there was no dissent by a member of the jury at any time, nor any objections by defendant's counsel, which facts parallel those in the instant case. Justice Heher disposed of this argument by citing *State* v. *Cooper, supra,* as follows:

> "A finding of circumstances constituting murder of the first degree is not to be annexed to a verdict of 'guilty' by intendment or a presumption based upon the evidence. That is a solemn obligation of

> the jury in a matter of the utmost gravity; and its fulfillment cannot be made to rest on bare inference. The death sentence cannot be pronounced unless the verdict is definitive of the degree of guilt which entails that penalty. Not only in resolving an issue involving the death penalty or life imprisonment, the finding be specific and not left to conjecture; it is inconceivable that it would not have so provided".

and again as follows:

> " * * * the failure of the accused, at the time of sentence, to question the sufficiency of the verdict, by motion in arrest of judgment or otherwise, did not serve to confer upon the judge jurisdiction to impose the extreme penalty as for murder in the first degree."

The Court then left no doubt as to how it considered the rendition of such a verdict, as follows:

> "The question involves more than a technical violation of a statute or rule of procedure. It is a matter 'of utmost gravity' as it adjudicates not alone the guilt of the death but carreis with it the punishment of death. Such a determination cannot be left to inference. The finding must be specific and in exact accord with the statutory mandate.
>
> (6) We think the law clearly demands that when a jury in a murder case is polled, each juror, if he finds the defendant guilty, shall designate by his verdict whether it be murder in the first degree or in the second degree.
>
> (7) This was not done in the case under consideration and we think it constituted prejudicial and therefore reversible error".

Our Supreme Court later in *State* v. *Myers*, 7 N. J. 465 (Sup. Ct., 1951), WACHENFELD, *J.* considered a situation where after the foreman had announced a proper verdict designating the proper degree of murder, and the jury being polled by means of the clerk asking them if the ver-

dict as rendered by the foreman was their verdict, and each replied variously "Yes", "Yes, sir", "It is", stated that the poll as conducted in that case satisfied the rights of the defendant under R.S. 2:138-2 and Rule 2:7-9(d). However, the Court distinguished that situation from the case of *State* v. *Cleveland, supra.* The facts in the instant situation with regard to the poll of the jury show clearly that the facts of the case *sub judice* are parallel with the case of *State* v. *Cleveland, supra,* and the principles enunciated in *State* v. *Cleveland, supra,* are clearly applicable to the situation here.

In re: *Andres* v. *U. S.*, 333 U. S. 740, 68 S. Ct. 880 (1948), Mr. Justice FRANKFURTER concurring, amongst other things, stated;

> "The legislature may require the jury to specify the punishment in their verdict. Under such legislation it is necessary for the jury's verdict not only to pronounce guilt but also to prescribe the sentence.
>
> Nine States have statutes more or less like the federal provision here under consideration * * * New Jersey.
>
> The decisions in the highest courts of the several states under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion. Winston v. United States, supra, 172 U. S. at page 313, 19 S. Ct. at page 215. The fair significance to be drawn from State legislation and the practical construction given to it is that it places into the jury's hands the determination whether the sentence is to be death or life imprisonment, and, since that is the jury's responsibility, it is for them to decide whether death should or should not be the consequence of their finding that the accused is guilty of murder in the first degree. Since the determination of the sentence is thus, in effect, a part of their verdict, there must be accord by the entire jury in reaching the full content of the verdict."

In re: *Ochoa* v. *U. S.*, 167 Fed. Rep. 2d 341 (1948), it was held,

> "the trial court is not permitted to define or limit in any way the jury's exercise of the right to qualify the verdict. The trial court cannot circumscribe the right of the jury in that respect, but must commit the whole matter of its exercise to the judgment and consciences of the jury."

Therefore, the defendant, Vaszorich, respectfully urges that the Court's judgment of death pronounced was predicated upon a fatally defective verdict of guilty as displayed by the poll of the jury herein.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

Dated September , 1953.

EDWARD F. JUSKA,
Attorney for Petitioner, John Louis Vaszorich.

LEMUEL SKIDMORE,
Attorney for Petitioner, John Louis Vaszorich.

APPENDIX

CONSTITUTION OF NEW JERSEY, 1947, ARTICLE I:

Article I

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

Article VI, Section II

3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

REVISED STATUTES:

2A: 113-1 Murder. If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal of this state, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of

his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a private person interposes, then such person so killing is guilty of murder.

2A: 113-2. (Formerly R. S. 138-2) Degrees of murder; designation in verdict. Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

TABLE OF RULES OF NEW JERSEY COURT CITED:

1:2-19(a). In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury. The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. A verdict of a jury shall not be set aside as against the weight of the evidence unless it clearly

and convincingly appears that the verdict was the result of mistake partiality, prejudice or passion.

2:3-3 (a), (b), (c). Proceedings Before Magistrate.

(a) Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate. A complaint shall be filed forthwith and a warrant issued thereon.

(b) Statement by the Magistrate. The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket.

2:7-3. Opening Statements to Jury.

Before any evidence is offered at criminal trials, the state shall make an opening statement to the jury. Immediately thereafter, the defendant or his attorney shall make an opening statement outlining his defense. Failure of defendant or his attorney to make such opening at that time shall bar any further opening by defendant or his attorney through the trial.

2:7-9 (a), (d). Verdict.

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(d) Poll of the jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

2:10-2. Presence of the Defendant.

The defendant shall be present at the arraignment, at the pre-trial conference if any, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. The defendant's presence is not required at a reduction of sentence under Rule 2:7-13.

2:12-7. Exceptions in Criminal Cases.

Exceptions to rulings or orders of the court or instructions to the jury are not required in order to reserve the questions involved for review on appeal; and for all purposes for which an exception has heretofore been necessary it suffices that the defendant, at the time the ruling or order of the court is made, or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him.

Rule A-1, General Rules of Administration.

Court Hours: The Supreme Court, the Superior Court, the County Courts and the District Courts shall sit from 10 A.M. to 1 P.M. and from 2 P.M. to 4 P.M., unless the Chief Justice shall order otherwise.

BOOKLET: PRIMARY INSTRUCTIONS TO JURORS:

(Explanation: The subject booklet around which Point A of the Argument revolves is not available for attachment to the 40 copies of this petition and brief. The booklets were ordered destroyed following their discovery. The petitioner has three copies. Two of these copies will be attached to two copies of the petition and brief herein. Therefore, petitioner has extracted those sections which he desires the Court to consider):

• • •

"On the head of the criminal lies the crime; but in a miscarriage of justice the jurors delinquent become participants of guilt." Lycurgus (appears on back cover).

• • •

Q. What is a reasonable doubt? The term 'reasonable doubt' carries with it its own explanation. It is just what the words imply: a doubt founded upon reason. It does not mean any doubt whatever, but is such a substantial doubt arising in the mind of a reasonable man after a careful review and consideration of all the evidence, or the lack of evidence in the case, that produces an uncertainty and no abiding conviction of the defendants guilt. A reasonable doubt is one for which, should he be called upon, a juror can give a reason. It is not a guess or a whim, nor is it a surmise that for some unknown reason the defendant may be guiltless, nor is it a subterfuge that may be resorted to to avoid the doing of a disagreeable duty. A reason must support the doubt.

• • •

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No. 357

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

JOHN LOUIS VASZORICH,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

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State of New Jersey,

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October 26, 1953.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

JOHN LOUIS VASZORICH,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Court of New Jersey is reported in *State* v. *Vaszorich,* 13 N. J. 99. This opinion, together with the dissent filed, is set forth in the petition to this Court at pp. 28-63.

Jurisdiction.

The petitioner asserts in his petition (p. 5) that the jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1257(3).

It is respectfully submitted that the decision of the Supreme Court of New Jersey in this case, involving the questions presented in the petition, is in full conformity with the provisions of the United States constitution re-

specting due process of law as guaranteed therein,[1] and in conformity with the provisions of the constitution of the State of New Jersey of 1947,[2] and that said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

Further, certain of the points of argument raised by the petitioner were decided by the court below solely on non-constitutional grounds, and the petitioner is therefor precluded from urging the same questions before this Court on constitutional grounds for the first time. *Whitney* v. *California*, 274 U. S. 357, 360; *Dewey* v. *Des Moines*, 173 U. S. 193, 200.

It is therefore respectfully submitted that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Supreme Court of New Jersey.

---

[1] Constitution of the United States, Amendment XIV, Section 1.

[2] The constitution of New Jersey, 1947, Art. I, Sec. 1, provides:

"All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Article I, Sec. 10, of the New Jersey constitution provides:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

Counter-statement of the Case.

Petitioner herein, John Louis Vaszorich, together with George Eugene Christian Brown and Robert John Berry, were tried and convicted on December 18th, 1951 of feloneously killing Jeremiah Delhagen on September 8th, 1951. The jury's verdict was murder in the first degree,[3] with recommendations of life imprisonment as to Brown and Berry only.[4] The effect of no recommendation as to Vaszorich necessitated a mandatory death penalty.

Vaszorich and Brown appealed their judgments of conviction to the Supreme Court of New Jersey and their convictions were affirmed (*State* v. *Vaszorich*, 13 N. J. 99 (Sup. Ct., 1953).)

Vaszorich alone now petitions this Honorable Court for issuance of a writ of certiorari to review the determinations of the Supreme Court of New Jersey.

The pertinent facts of the case are as follows:

First, however, in reference to statements herein relating to the petitioner's confession and in view of the fact that the petitioner has raised question concerning the volun-

---

[3] N. J. S. 2A:113-2 (formerly R. S. 2:138-2) provides:

"Murder * * * which is committed in perpetrating or attempting to perpetrate * * * robbery * * * is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree."

[4] N. J. S. 2A:113-4 (formerly R. S. 2:138-4) provides:

"Every person convicted of murder in the first degree * * * shall suffer death unless the jury by its verdict, and as a part thereof, upon and after the consideration of all the evidence recommend life imprisonment, in which case no greater punishment shall be imposed."

tary nature of his confession, the respondent will confine references to the record to only those matters which were established by Vaszorich's *own testimony* given at the trial.

The chain of events which led to the unwarranted death of Jeremiah Delhagen on the night of September 8th, 1951, began when Brown, driving his uncle's automobile, picked up Vaszorich at his home in Ocean Grove at about 8 P. M. (R645a-39; R646a-9). The two of them then picked up Berry. After driving around for a period of time, the three of them ended up at the home of Jeremiah Delhagen in the Wayside section of Ocean Township (R646a-16). The admitted purpose of going to the Delhagen home was to commit robbery (R656a-36; R657a-28). The plan had been conceived two days before (R652a-23).

Pursuant to their intended design and plan, the three men broke into and entered the home of Jeremiah Delhagen (R647a-11). Once inside the home they admittedly committed robbery by taking $300 from the person of Jeremiah Delhagen (R648a-14; R677a-23 to R678a-34; R579a-14; R579a-29).

In the course of the commission of this robbery, Jeremiah Delhagen was struck severe blows by Vaszorich (R647a-29) in and about the head (R704a-37 to R705a-29). The striking was done with fists and with a heavy wrench taken from Delhagen's cellar. Delhagen was not fully conscious (R678a-40) as the three men jumped on him, pummelled him, and removed his wallet from his trousers (R660a-26; R678a-24).

When the three men left Delhagen's home, they were splattered with his blood (R662a-18) and Vaszorich later attempted to burn his shirt because of this fact (R649a-24; R675a-13). The house was left in shambles.

Jeremiah Delhagen was also covered with his own blood after the three men had finished beating him. His eye was swollen closed and his head was severely lacerated in multiple places.

Mr. Delhagen died on September 10th, 1951 in the Fitkin Memorial Hospital from the severe beating he had received.

Dr. Torren, the County Physician, conducted an autopsy on the body of Jeremiah Delhagen on September 10th, and his testimony at the trial described the extent of the injuries inflicted as follows (R307a to R311a):

> "A. • • • The left eye was ecchymotic—that is, it was discolored—and greatly swollen. The lids of the left eye were bluish black in color. There was a lacerated wound—that is, a torn wound—on the right side of the forehead, which was approximately an inch and a half long. It was almost vertical in direction and on a line with the inner end of the right eyebrow.
>
> Mr. Juska: Excuse me, Doctor. I dislike very much to interrupt, but just so there will be no confusion about it, may the record show that Dr. Torren is referring to the original autopsy notes he made, or to the original autopsy report, a copy of which we have. Is that correct?
>
> The Witness: I don't know if you have a copy or not.
>
> The Court: What are you referring to, Doctor?
>
> The Witness: My notes. A transcript of my notes.
>
> The Court: Your own original notes?
>
> The Witness: Yes, sir.
>
> The Court: And you need those notes to refresh your recollection, I assume?

The Witness: Oh, yes, sir.

The Court: Very well. You may use them then.

A. (Continuing) There was blood in the nose. There was a slight laceration on the bridge of the nose, and there were numerous lacerated wounds of the scalp. There were two parallel, rather parallel, over the vertex right on the top of the head. One was about an inch and a half long, and the other about two inches long. They were diagonal in position with the right ends of the lacerations toward the front of the body.

There was a tear on the right temple approximately one inch long, and also a triangular tear—that is, consisting of two branches—that was also on the right temple, and that was about a little less than an inch and a half long on each arm of the triangle.

There were three lacerations on the top of the left ear; that is, of the pinna of the ear, this portion. It was a transverse laceration on the back of the vertex; that is, in this portion back here, transverse meaning crossways of the body, and that was two inches long; and below that one were two more smaller ones which were in an anteroposterior direction.

There was one on the occiput or base of the skull which was an inch and a half long, and there was a small laceration of the scalp above the pinna of the left ear.

There was blood in the left ear.

There was a contusion—that is, a bruise—and a slight laceration on the left shoulder at the base of the neck in this area.

There was a bruise on the outer side of the left arm at the juncture of the upper and middle thirds, about in this area, and another on the left elbow.

There was a bruise and fracture of the middle finger of the left hand, and a lacerated wound of the distal portion of the fourth finger of the left hand.

There was a bruise on the right elbow, one on the back of the right hand. There were two small lacerations on this surface of the right wrist, and numerous small lacerations and bruises on the anterior surfaces—that is, the front surface—of both legs.

On dissecting back the scalp, retracting the scalp, there was found what we call a hematoma—that is, an accumulation of blood in the loose tissues—covering practically the entire top of the skull, the entire cranium from side to side.

There was a slightly depressed fracture of the cranium in the left parietal area. That is this area right in here above the ear. This fracture was a linear fracture with slight depression of the inner table, and it was rather Z shaped. That is, it came down like this, back, and then down.

I should explain, I think, that the skull is composed of two layers of dense bone with an area of soft or spongy bone between them, and in cases of fracture these tables, as we call them, may separate in the fractured area, and that is what had transpired in this fractured area. The outer table, the plane of contour was practically uniform—in other words, the outer table did not demonstrate depression—but the inner table was displaced inward slightly.

Down at the base of the brain and lying in a little cup-shaped depression on the floor of the cranium is a body known as the pituitary or hypophysis cerebri, and underneath this there was hemorrhage. Underneath this pituitary body there was hemorrhage, and just to the side of this fossa or cup-shaped depression there was a fracture, a linear fracture in the bone.

Now, the skull is lined with a membrane, a tough fibrous membrane, very tough, and between the skull and this membrane in this case was an enormous extravasation of blood which had spread over all surfaces so that practically the entire dome of the

skull presented this hemorrhagic area. Now, it wasn't very thick because of the denseness and tenseness of the structure in that area, but it had spread over the entire dome of the cranium. That is, on the under side of the bone, you understand, as we had on the outer side of the skull we had the hemorrhage under the scalp, on the inside of the skull we had this hemorrhage between the dura and the bone, the dura being the membrane which lies next to the bone and in this case was separated by the hemorrhage.

Then on exposing the brain, going through this dura and exposing the brain, there was hemorrhage, what we call subarachnoid hemorrhage, that is, hemorrhage between the brain substance itself and the coating or covering of the brain proper, hemorrhage over all surfaces of the brain.

The brain also has cavities in it which contain fluid, and there was the blood stained fluid in each of those cavities.

I also opened the middle ear on each side and on the left side I found blood in the left middle ear, which means that there was a fracture in that locality, although the fracture was not demonstrable with the naked eye, but the presence of blood there, in the absence of a perforating wound from the outside, means fracture."

Dr. Torren further testified that there were all together "eighteen lacerations, of which fourteen were on the head and four others distributed on the shoulder, arm, wrist and hand" (R314a-15).

Vaszorich admitted that he had obtained a large wrench and a meat cleaver from Mr. Delhagen's cellar before entering the house (R647a-17) and that these weapons were taken into the house (R647a-21). Vaszorich struck Jeremiah Delhagen with this wrench.

Dr. Torren also testified that he conducted tests upon the wrench and found "blood on almost all surfaces of this instrument" (R319a-31). The wrench was found by Officer Hundertpfund on the Delhagen front lawn the morning following the attack (R218a-14).

The foregoing is a concise outline of the matters which were *testimonially* brought to the attention of the court and jury. The reported record is scattered and much of the testimony concerns the question of the circumstances under which the confessions of the defendants were made.

The confession of the petitioner is attacked in his brief (Point D) as having been given involuntarily and therefore lacking in the due process of law required by the Fourteenth Amendment. In support of this contention, he makes a recital of facts (pp. 83-84) which is short and graphic, but which is not in accord with the record. The statement (p. 83) that Vaszorich "* * * was questioned for hours on end every day by waves of inquisitors * * *" is purely a figment of someone's imagination. The record is completely barren of any such activity.

Vaszorich was picked up by the police on the morning of October 1st, 1951. His confession was made on the afternoon of October 4th. Just what took place during this period of time is set forth in Vaszorich's *own testimony* taken at the trial. What did his testimony show?

After being picked up by the police on the morning of October 1st (R555a-38), Vaszorich was taken to the Ocean Grove Police Station (R556a-9). From there he was taken to the Deal Police Station (R556a-20). At Deal he was questioned, *but not about the present case* (R557a-24). On the evening of October 1st, he was first questioned about

the Delhagen murder (R558a-23). He was questioned from 10:30 P. M. until about 1:30 A. M. (R558a-36; D559a-10). He was then allowed to sleep out the night.

The next morning, October 2nd, Vaszorich was taken before Judge Hurley, Ocean Township magistrate, and was charged with the murder of Jeremiah Delhagen (R559a-24). From this hearing he was taken to Freehold (R559a-39). From Freehold, Vaszorich and Berry were taken to the scene of a prior crime *not connected with the Delhagen killing* (R560a-29). No questioning of Vaszorich took place on October 2nd (R560a-36).

On Wednesday, October 3rd, Vaszorich was taken out into the woods to investigate a phase of the crime charged (R561a-12). He was not questioned when he was brought back to the jail (R561a-21).

On Thursday, October 4th, three days after Brown and Berry had confessed the Delhagen killing, Vaszorich was questioned by the Prosecutor's Office, at which time he made his written confession. No claim of any *continued* questioning was made from the witness stand (R561a-24). The questioning started about 2:30 P. M. (R564a-39) and the confession was given at 4:45 P. M. (R507a-26).

On cross examination, Vaszorich admitted that he signed the confession given to the Prosecutor (R564a-31) and that he initialed all the pages (R564a-32). There was no testimony by Vaszorich that he was ever put in fear or was ever made promises of leniency or reward if he confessed. Nor is there any testimony that he was ever threatened or that physical or mental coercion was used upon him.

After Vaszorich's confession was transcribed—it had been taken stenographically—he read and signed it in the presence of Joseph C. Kingdon, Court reporter (R508a-12).

Charles A. Johnson, reporter for the Asbury Park Press, testified that he was present when Vaszorich signed his confession and that when Vaszorich was asked whether the confession was voluntary or forced upon him, Vaszorich replied "No, no, it is all my own" (R515a-42).

Paul Thead, reporter for the Long Branch Record, testified that he was also present when the confession was signed and that he also heard Vaszorich say that the confession was voluntarily given (R523a-20).

Harry Zuckerman, Monmouth County detective, testified that he was also present when Vaszorich made his confession and that Vaszorich had been informed, prior to giving the statement, that the confession would have to be voluntary and that no promises were being held out to him or force used (R528a-25). The petitioner was also informed that whatever he might say could be used against him in a court of law (R529a-13). Mr. Zuckerman also testified that, in fact, the confession was voluntarily given by Vaszorich and that no promise of reward or immunity was made nor was force or coercion used (R528a-30).

Officer Garrity of the Ocean Township Police was also present at the time of the confession and his testimony was the same as Detective Zuckerman (R543a-11 to R544a-14).

The testimony of these *impartial* witnesses stood uncontradicted and unimpeached on cross examination.

Summary of Argument.

POINT I—The jury panel from which the trial jury was drawn had been issued an instruction booklet concerning general propositions of law. The propriety of issuance of this booklet was argued before the Supreme Court of New Jersey. The opinion filed by the Court below shows that this booklet question was not considered or decided upon any constitutional ground. Petitioner attempts to raise a federal question before this Court for the first time and the respondent submits that this Court acquires no jurisdiction to review a judgment of a state court unless it affirmatively appears on the face of the record that a federal question was decided by the Court below.

In any event, meeting petitioner's argument on its merits, the booklet was timely withdrawn from the jury panel before trial commenced and with appropriate instructions from the trial judge to accept on the law pronounced by the court. Petitioner received a fair hearing and there was no violation of due process in his conviction.

POINT II—Petitioner's trial counsel was appointed weeks in advance of trial. Prior to commencement of litigation, the court instructed counsel that evening sessions would be held. It is submitted by respondent that petitioner was not deprived of representation of counsel by continuation of trial during evening sessions. The requirement of due process is satisfied when there is a fair hearing.

Further, no federal question was decided by the court below.

POINT III—The instruction by the trial judge to petitioner's counsel during his opening to the jury to his

defense, if he had one, was within the province of comment by the trial judge and petitioner was not thereby deprived of a fair hearing.

Further, no federal question was decided by the court below.

POINT IV—The record shows that treatment of petitioner prior to his confession was far above the minimum standards of fundamental fairness. Further, petitioner *admitted* from the witness stand each element necessary under New Jersey law to warrant and justify his conviction.

POINT V—The Prosecutor was justified in commenting in his summation upon matters initiated by petitioner's counsel in his opening and closing statements, although the comments were not strictly confined to the record. The comments were approved by the Supreme Court of New Jersey and the entire trial was circumscribed with fundamental fairness.

Again, there was no federal question decided by the court below.

POINT VI—The manner in which the jury returned its verdict was approved by the Supreme Court of New Jersey. The question raised by petitioner relates solely to an interpretation and enforcement of the law of the State of New Jersey and no federal question was decided or involved.

ARGUMENT.

POINT I.

Concerning the instruction booklet possessed by the jury panel, it does not appear from the record that the Supreme Court of New Jersey decided any federal question whatever.

In any event, meeting petitioner's argument on its merits, there was no violation of due process by the possession of the instruction booklet by the jury panel.

The jurisdictional rule of this Honorable Court as set forth in the case of *Whitney* v. *California,* 274 U. S. 357, 360 is as follows:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court (citing cases)."

Again, it has been further said in the case of *Dewey* v. *Des Moines,* 173 U. S. 193, 200:

> "A claim or right which has never been made or asserted cannot be said to have been denied by judgment which does not refer to it. *Hamilton Company* v. *Massachusetts, supra.* (6 Wall. 632). A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon

> the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." (Citation added).

A written opinion filed by the highest state court is part of the record before this Court. It is of necessary importance in determining whether the state court actually considered a federal question in reaching its decision. A necessary corollary of this inquiry is that any discussion appearing in a dissenting opinion is of no import in determining the existence of a federal question.

Then, the preliminary inquiry is whether or not the highest court of the state dealt with and disposed of a federal question. In the instant case there is not even an intimation in the majority opinion that a federal question was involved. The opinion (*State* v. *Vaszorich*, 13 N. J. 99, 112; petition pp. 35-40) disposed of the entire instruction booklet question in the following manner (*State* v. *Vaszorich*, 13 N. J. 99, 114; petition pp. 38-39):

> "* * * the irregular matter came to light at a time when all parties and the trial court had a full and ample opportunity to take steps to avoid any improper influence of the manual upon the minds of the jurors and prospective jurors. The real question is whether in the circumstances of the case; with particular reference to the precautions taken by the trial judge, enough was done to dispel the tendency of the contents of the manual for improper influence. We think the prompt and firm action of the trial judge disclosed by the excerpt from the record above was sufficient in the circumstances. Apart from the fact that no motion for mistrial was made, or even if one had been made and was denied, it is not generally necessary that a mistrial be de-

> cleared. It will ordinarily suffice that the trial judge instruct the jury in definite and unexceptionable terms upon the right of the matter, which we think the trial judge did in this case, both at the time and later in his charge, when he instructed them that the jurors were to decide the case upon the evidence alone according to the law as he gave it to them."

Not only did the Supreme Court of New Jersey not decide a federal question in reaching its determination on this instruction booklet question, but the petitioner did not even broach a federal question in his briefs presented to that court. The petitioner filed his original appellant's brief with the Supreme Court of New Jersey in which he undertook a seven page argument on this booklet question. Later he filed a supplemental brief in which he undertook a seventeen page argument on the very same question. Nowhere in either of these two briefs did the petitioner even mention or suggest that he was raising a constitutional question.

As stated in *Dewey* v. *Des Moines,* 173 U. S. 193, 198:

> "In *Oxley Stave Company* v. *Butler County,* 166 U. S. 648, it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakeable manner, and unless he do so this court is without jurisdiction to reexamine the final judgment of the state court upon that matter (citing cases). In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * *"

It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Whitney* v. *California*, 274 U. S. 357, 362.

However, in order to present full argument on all points raised by the petitioner and in order to meet all of his arguments on their merits, the respondent offers the following.

Recognizing that the booklet possessed by the members of the jury panel contained inaccurate statements of the law of New Jersey, what steps were taken by the trial court to remove this improper influence?

First: The existence of the booklet in the possession of the jury panel was discovered *before* the actual trial had started.

Second: Just as soon as the existence of the booklet in the possession of the jury panel became known to the court, certain and decisive action was immediately taken to withdraw the booklet as a possible influence in the course of the forthcoming trial. Any possible harm was completely cured by the following instruction promptly given to the jury panel (R15a):

> "In view of the fact that the law is given to you by the Court and under the system you must take the law from the Court and not from the Sheriff, I am asking that these booklets be picked up by Sheriff White now."

All of this took place before the trial jury was fully chosen; before one shred of evidence was heard; before the trial jury was sworn; and all in the presence of the

petitioner and his counsel. The respondent submits that the petitioner's entire trial was completely circumscribed with that element of fundamental fairness which is essential to our concept of fair hearing.

THIRD: At the close of the entire trial, the trial jury was instructed by the court:

(R880a):

> "The function of the Court is to instruct the jury with reference to the principles of law governing this case. You, however, are the sole judges of the facts, the weight of the testimony, the credibility of the witnesses, the inferences to be drawn from the evidence, and the ultimate conclusions to be reached upon all of the facts."

(R889a):

> "I charge you that the defendants are presumed to be innocent until proven guilty and they are entitled to the benefit of any reasonable doubt arising upon the evidence. The burden is upon the State to prove beyond a reasonable doubt every material element of the crime, and if upon such proof there be a reasonable doubt with regard either to the guilt of anyone of the accused or to the degree of criminality, he is entitled to the benefit of the doubt. Such burden of proof remains upon the prosecution throughout the whole case and it never shifts.
>
> "When we speak of reasonable doubt, it is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. Reasonable doubt refers to that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding

> conviction to a moral certainty of the truth of the charge. The evidence must establish the truth of the fact to a moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it, and, ladies and gentlemen, if after carefully considering the evidence, giving the accused the benefit of reasonable doubt, you are led to the conclusion that they or anyone of them are guilty, you should so declare by your verdict."

This definition of reasonable doubt is in complete accordance with the leading decision of New Jersey, and is couched in the very language of that case. *Donnelly* v. *State,* 26 N. J. L. 601 (E. & A., 1857). The principal objection of the petitioner to the instruction booklet was that it contained inaccurate definition of reasonable doubt (brief p. 70). The trial court's charge left no doubt in the juror's minds as to what law they should apply and what the law of reasonable doubt was in New Jersey.

In petitioner's brief (p. 70) he argues that, *inter alia,* he was deprived of rights guaranteed to him under the Fifth and Sixth Amendments. Here petitioner has erred in his argument for it is clear that the provisions of the Fifth and Sixth Amendments do not apply to state action, nor do they apply to state action through the Fourteenth Amendment. *Palko* v. *Connecticut,* 302 U. S. 319, 323; *Adamson* v. *California,* 332 U. S. 46, 53. The petitioner quotes at length in his brief (p. 70) from *Palko* v. *Connecticut, supra,* concerning the relationship between state action and due process, but a careful reading of that case fails to disclose any such quotation ascribed to that case by the petitioner.

The basic concept of due process as applied to state action through the Fourteenth Amendment is that of fair

hearing. As applied in criminal matters, the inquiry is always one to determine whether there has been observance of the fundamental fairness essential to the very concept of justice. The purpose of due process is not to protect the accused against a proper conviction but against an unfair conviction, *Adamson* v. *California,* 332 U. S. 46, 53.

Petitioner's argument in his brief (p. 76) that the exposure of the jury panel to the instruction booklet in question was in effect a deprival of his right to be present at every stage of the proceeding is too tenuous to merit consideration. The jury panel was given the booklet when the panel was first formed and the booklet was taken from the panel, with appropriate corrective instruction, before the trial jury was chosen and before trial was actually commenced. In the case of *Snyder* v. *Massachusetts,* 291 U. S. 97, 107, it was said:

> "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

Further, the same court said at page 116 (291 U. S. 97, 116):

> "* * * The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The

> due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall'. *Ownbey, Morgan, supra* (256 U. S. 94). * * *" (Citation added).

The holding of the *Snyder* case was that the state of Massachusetts did not deprive the defendant of due process of law when he was excluded from a view of the scene of the crime by the jury. The court said (291 U. S. 97, 106) that due process assured the defendant the privilege of presence at his trial, but not when his presence would merely be a useless gesture. The reasoning in the *Snyder* case completely destroys petitioner's argument in the present case wherein he argues (brief p. 76) that he was deprived of due process when he was not present when the jury panel was exposed to the instruction booklet.

Petitioner quotes at length in his brief (pp. 72-75) from decisions of sister states which this respondent does not consider applicable to support petitioner's arguments.

In *People* v. *Schoos*, 339 Ill. 527, 78 N. E. 2nd 245, 251 and in *People* v. *Weatherford*, 160 P. 2nd 210, the respective courts were confronted with the problems of booklet instructions possessed by the jurors right up to and including the time of trial and jury deliberations. No such situation existed in the present case where the booklet was discovered and withdrawn from the jury, with appropriate corrective instruction, before the jury was sworn or trial commenced.

In *People* v. *Fisher*, 340 Ill. 216, 172 N. E. 743, 756, the entire jury panel was given general oral instructions on their official duties. The Supreme Court of Illinois re-

marked that such practice should be indulged in with caution in view of the fact that after a jury is accepted and sworn only written instructions may be given.

In *Williams* v. *State*, 89 Tex. Crim. 334, 231 S. W. 110, 111, and in *Thomas* v. *State*, 97 Tex. Crim. 432, 262 S. W. 84, 85, the respective courts orally lectured the jury before trial, but after being sworn, on relevant duties. Again, these situations are readily distinguishable from the present case where, as previously stated, the booklet was discovered and withdrawn from the jury before the selection of the jury was completed.

In all of the cases cited by petitioner the improper instructions were not brought into issue until *after* trial was completed. In only one of the cases (*People* v. *Weatherford*) was the question of due process even mentioned.

It is respectfully submitted that the petitioner has not only failed to demonstrate the existence of a federal question which is the *sine qua non* of jurisdiction before this Court, but he has further failed to show that his conviction was without due process of law in any respect.

POINT II.

The petitioner was not precluded from a fair hearing nor denied the representation of counsel by the continuation of trial during evening sessions.

In any event, the court below did not consider or decide any federal question.

The trial of this matter commenced on Monday, November 26th, 1951, and in accordance with a New Jersey statute

in cases of this nature,[5] the *voir dire* of prospective jurors was conducted on an individual basis under oath. The *voir dire* continued until the morning of Monday, December 10th, when a panel of 14 jurors was finally drawn. During the two weeks period from November 26th to December 10th, a total of 176 prospective jurors were individually examined.

On the afternoon of Friday, December 7th, only 13 jurors had been selected. There were no more members of the general panel to be examined in order to select the 14th juror. Efforts by the sheriff to obtain additional talesmen was unsuccessful. The matter was adjourned until Monday morning, December 10th, with the clear direction from the trial judge that evening sessions would be held, if necessary, in order to expedite the matter to a completion. No objections to this announcement were made by counsel. The anouncement was made by the court in the following manner:

> "The Court: Ladies and gentlemen, the Court is sorry to announce that the Sheriff acknowledges defeat. He has been unable at this late hour of the day to procure the services of any talesmen, although he has contacted a half a dozen organizations, including the mill here in Freehold. Therefore of necessity I can't get any more talesmen for today, but I am directing the Sheriff to bring in thirty-five talesmen, if it is possible for Monday morning, and so that the jury may not unnecessarily get con-

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[5] N. J. S. 2A:78-4 (formerly R. S. 2:92-4; 2:92-10) Examination of Jurors

"* * * In all cases in which a death penalty may be imposed, the examination as to competency shall be under oath, but in other cases it shall be made without putting the juror under oath. * * *"

cerned, it will be my purpose after this case gets rolling to sit much past the four o'clock adjournment hour, and if it becomes necessary I will sit at night so that we will get finished. I will see you Monday morning."

On Monday, December 10th, after the 14th juror was chosen and the jury impanelled, the trial judge announced to counsel that the court would sit in evening session that evening. No objections to this direction was made by trial counsel. This announcement by the court was made as follows:

"Mr. Frankel: I should like to ask your Honor about how long the openings will take so that I can figure on when to have my first witnesses.

The Court: Well, the openings should not take too long. A half hour should be enough.

Mr. Frankel: Yes. Well, I won't take that long.

The Court: Maybe shorter than a half hour; so much the better. Incidentally, I am going to work until nine o'clock tonight. So guide yourselves accordingly."

Later in the day of Monday, December 10th, counsel for the defense requested audience with the trial judge at the side bar (R109a to R110a) to indicate that they did not desire to sit in evening session. It is important to note that no specific objection was made by counsel to the extension of trial hours. The court observed that permission had been obtained from the Chief Justice to extend trial time into evening session (R109a-28).

The court sat in evening session on Monday, December 10th (R128a-27), Tuesday, December 11th (R338a-19), and Wednesday, December 12th (R527a-31). On Thursday, December 13th, the State rested its case (R634a-14) and the

defense case was begun. The defendants presented their case on Friday, December 14th and completed the same early on the morning of Monday, December 17th. After a short rebuttal by the State, the summations were made on the afternoon of December 17th.

Actual trial time, *in litigation,* was six days, including the three evening sessions. The foregoing matters have been outlined merely to demonstrate the weakness of the arguments presented by petitioner wherein he argues that the trial judge erred in "forcing" the trial into overtime sessions and thereby caused the petitioner to be precluded from having a fair and impartial trial.

The observation of the petitioner (brief p. 79) that "bitter objection" was raised by trial counsel to the overtime sessions does not accord with the record (R109a to R110a-20). In fact, Mr. McCurrie, counsel for the defendant Berry, stated that he was not averse to reasonable overtime sessions (R109a-30) and Mr. O'Hagan, counsel for the defendant Brown, said that he felt that way too (R110a-9).

The alleged "breakdown" (petitioner's brief p. 79) of Mr. McCurrie is evidenced by an unenlightening entry in the record (R777a-36) wherein the court asked Mr. McCurrie if he wanted a recess. The fact of the matter is that Mr. McCurrie began to sob at that point in the trial, and after a few minutes composure he again resumed examination of his witness. Mr. McCurrie is a life long friend of the Berry family and it is indeed little wonder that he might have had occasion to shed a tear during the course of questioning which concerned the Berry family. Mr. McCurrie did not collapse and he certainly did not have a breakdown.

The cases cited by the petitioner in support of his arguments (brief p. 79) are not appropriate to the facts of the instant case. Certainly after weeks of preparation for the trial by defense counsel, it cannot reasonably be said that the litigation was unduly expedited at the expense of justice. There was no abuse of judicial discretion in the ordering of evening sessions.

The case of *Avery* v. *Alabama*, 308 U. S. 444, cited by petitioner to support his argument that the three evening sessions deprived him of his representation of counsel, does not lend the desired support to petitioner's position. In the *Avery* case the accused was arraigned on a Monday and counsel was appointed to represent him the same day. The case was tried, over objection of counsel, the following Wednesday, two days later. This Court held that the accused had not been denied the benefit of assistance of counsel.

In the instant case, counsel was appointed weeks in advance of trial; motions were made to examine evidence; witnesses were interviewed and the scene of the crime was visited and examined. Certainly, in view of the trial court's advance notice of intended evening sessions, the petitioner cannot say that he was denied the assistance of counsel. As stated in the *Avery* case, *supra*:

> "In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their border, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial. Consistently with the preservation of constitutional balance between state and federal

> sovereignty, this Court must respect and is reluctant to interfere with the state's determination of local social policy. * * *"

It is submitted that the determination to carry the trial time into evening sessions was purely a matter of local policy. This court has steadfastly maintained that it has no authority to determine whether a state court has erred in the interpretation of enforcement of its own laws. *Twining* v. *New Jersey,* 211 U. S. 78, 91. The basic element of the exercise of jurisdiction by this Court is the determination of a federal question by the state court below, and, as stated in the *Twining* case, *supra* at page 91, "* * * If the right here asserted is not a Federal right, that is the end of the case. * * *"

Examination of the opinion filed by the Supreme Court of New Jersey in this case (*State* v. *Vaszorich,* 13 N. J. 99, 115-116; petition pp. 40-41) clearly demonstrates that no federal question was decided or even considered.

POINT III.

The remark made by the trial judge during counsel's opening statement was not improper and the petitioner was not thereby deprived of a fair trial.

In any event, the court below did not decide any federal question.

The rules of Criminal Practice of the New Jersey courts provide that in a criminal proceeding the State first makes its opening, followed by the opening for the defense.[6] (Rule 2:7-3). The rule appears not to be mandatory, and the defense may waive the right to open. *State* v. *Craig*, 9 N. J. Super. 18, 22 (App. Div., 1950). However, if the defense chooses to make an opening statement, it becomes incumbent to outline therein the defense to the crime charged. (Rule 2:7-3). The defendant, or his counsel, cannot choose to make an opening, and then, without stating his defense, blithely proceed to indulge in philosophies disconnected with the defense.

Counsel for Vaszorich ignored the provision of Rule 2:7-3 wherein he was required to outline his defense to the jury. Instead, counsel indulged in unrelated topics, and, at a point where he was about to reiterate what one of the prospective jurors had said on *voir dire* about the "help and benefit of the strong arm of a father", the Prosecutor

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[6] *Rule* 2:7-3 (now Rule 3:7-3) provides:

"Before any evidence is offered at a trial, the state shall make an opening statement to the jury. Immediately thereafter the defendant or his attorney shall make an opening statement outlining his defense. Failure of the defendant or his attorney to make such opening at that time shall bar any further opening by the defendant or his attorney throughout the trial."

interposed an objection. The court took the opportunity to remind counsel of his duty to outline his defense, if he had one, and thereupon counsel *still* continued his perusal of matters not pertaining to a statement outlining his defense.

Another objection was interposed by the Prosecutor. Counsel then remarked that "We are not guilty at this stage of the proceedings, and that is my plea". This statement marked the terminal point of his opening to the jury.

It is to be noted that the defense, as stated by counsel for Vaszorich, was not a forthright plea of "not guilty", but was merely a reiteration of the law of New Jersey, i. e., that every accused is deemed to be innocent until proven guilty. However, the court accepted counsel's plea as being one of "not guilty" and the trial proceeded.

The trial court did not "rebuke" counsel during his opening to the jury, as the petitioner now argues in his brief (p. 80), but the court merely instructed counsel that since he chose to make an opening statement, he must include therein an outline of his defense (R30a).

In support of petitioner's argument, quotation at length is made from the case of *Marino* v. *Cocuzza,* 14 N. J. Super. 16 (App. Div., 1951) (brief p. 82) wherein the court spoke of the duty of a trial judge in reference to his function of presiding over the trial. The quotation, however, *stopped* just before the point in the opinion (p. 23) wherein the court observed:

> "It is undoubtedly within the province of the trial court to admonish and rebuke counsel as occasion may require."

It is submitted that on the facts in the present case, the trial court had ample occasion to instruct counsel that since he chose to make an opening statement, he must outline his defense. Wherein lies the alleged prejudice to the petitioner is difficult to perceive.

In the case of *Roberts Elec., Inc.* v. *Foundations & Excavations, Inc.*, 5 N. J. 426 (Sup. Ct., 1950), the court stated (p. 430):

> "While it is well recognized that the parties have the right to have their counsel sum up (open) the case to the jury, it is also well established that the trial court has the authority as well as the duty to keep the arguments of counsel as well as their conduct and actions within the limits of courtroom decorum." ("open" added).

The *Roberts* case was one in which the entire appeal was predicated upon alleged improper remarks made by the trial judge. During the entire trial the court interjected terse remarks concerning witnesses and the offers of evidence. Upon the offering of a bill of $2.54, the court is reputed to have remarked "Does anybody have $2.54 that they can give Mr. McGann so that we can get this matter over"; and during defense counsel's summation the court told him to "Stop kissing the jury."

These remarks of the court in the *Roberts* case were found to be insufficient grounds upon which to grant a reversal. Certainly those remarks were far and beyond any alleged improper remark made by the trial judge in the instant case. A trial judge is necessarily allowed wide latitude in the conduct of a trial consistent with established judicial practice. It is submitted that the trial of the present matter was in all things consistent with established

judicial practice, coupled with the exercise of sound judicial discretion, and the petitioner was not deprived of a fair trial.

In any event, respondent again wishes to call this Court's attention to the fact that the court below did not decide any federal question in reaching its determinations. In fact, the court below regarded the argument so tenuous as to summarily dispose of it in the following language (*State* v. *Vaszorich*, 13 N. J. 99, 118; petition pp. 42-43):

> "Vaszorich contends that he was prejudiced by the action of the trial judge interrupting his counsel's opening to the jury to press counsel to state his defense. We have examined the colloquy at that point and perceive no impropriety of the trial judge in the circumstances."

POINT IV.

The petitioner's confession was voluntarily given and its admission into evidence did not deprive petitioner of due process of law.

The factual pattern upon which the State of New Jersey predicated the admission of petitioner's confession into evidence has been previously outlined herein in the Counter-statement of the Case. The record of petitioner's own testimony discloses that he made his confession freely and without coercion or extortive methods. The manner in which he was detained and treated by the law enforcement officers was far within the minimum requirements of due process.

The test modernly applied to situations of this nature is set forth in *Lisenba* v. *California*, 314 U. S. 219, 236:

> "* * * The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. * * *
>
> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. * * *"

The specific matters into which inquiry is made in order to satisfy the foregoing generalization are characterized by such phrases as "sustained pressure", "overbearance," "suction process," and "wrenching of evidence which could not be extorted in open court with all its safeguards." *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Harris* v. *South Carolina,* 338 U. S. 68.

In the phrase "wrenching of evidence which could not be extorted in open court with all its safeguards" lies the frailty of petitioner's arguments in the instant case. When petitioner took the witness stand in his own behalf to testify as to the voluntary nature of his signed confession, he *admitted,* in court, that he looked through the statement after it was transcribed (R564a-16) and that he signed the statement and initialed each page (R564a-31).

In contradiction to petitioner's present argument wherein he speaks of "waves of inquisitors" (brief p. 83) and "days of psychological whipsawing" (brief p. 86), it must be observed that on examination restricted to the question of the voluntary nature of his confession, Vas-

zorich *volunteered* that "I never stated that I was being questioned the whole day" (R566a-41).

The record discloses that the circumstances surrounding petitioner's confession were not only implicit with "fundamental fairness," but that the confession was an expression of free choice characterized by spontaniety. By petitioner's own testimony, the actual questioning concerning the Delhagen murder consisted of three hours on the evening of October 1st (R558a-36; R559a-10), and about two and one-half hours on the afternoon of October 4th, when he gave his confession (R564a-39; R507a-26). He was never "overborne," nor was he a victim of "sustained pressure" or the "suction process of interrogation."

Confessions having this clear element of voluntariness are not violative of the due process clause of the Fourteenth Amendment. Confinement in jail is a circumstance to consider in arriving at the voluntariness of a confession, but, standing alone, such detention is not sufficient to brand a confession as "involuntary." *Roesel* v. *State*, 62 N. J. L. 216, 227, 228 (E. & A., 1898).

Vaszorich further argues (brief p. 84) that his detainment was illegal because he was not brought before a magistrate until the day following his arrest. This circumstance is insufficient to detract from a finding that his confession was voluntarily given. *State* v. *Cooper*, 2 N. J. 540 (Sup. Ct., 1949); *State* v. *Pierce*, 4 N. J. 252 (Sup. Ct., 1950); *State* v. *Bunk*, 4 N. J. 461 (Sup. Ct., 1950). In any event, it is submitted that Vaszorich was not questioned concerning the Delhagen murder until 10:30 P. M. on the day of his arrest (R558a-36) and he was promptly brought before the magistrate of Ocean Township the next morning.

The facts of the cases cited by petitioner in his brief are known to this court and no good purpose would be served to repeat them at length here. *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsyvania*, 338 U. S. 62; *White* v. *Texas*, 310 U. S. 530; *Chambers* v. *Florida*, 309 U. S. 227. It suffices to say that the various factual developments set forth in these cases disclose extreme cases of coercion and duress. In his argument, petitioner saw fit to quote the *law* of these cases, but neglected to recite the extreme factual patterns upon which the law was predicated. As stated in *Lisenba* v. *California, supra* (p. 237):

> "Where the claim is that the prisoner's statement has been procured by such means, we are bound to make an independent examination of the record to determine the validity of the claim. * * *"

The respondent submits that on the facts presented in the instant case, there is a clear showing that petitioner's confession was voluntarily made and the making thereof was circumscribed by the "fundamental fairness" spoken of in the cases. *Lisenba* v. *California, supra.* Despite the imaginative and graphic language employed by Vaszorich in his argument, it is a well recognized principle of law and of logic that an argument can be no stronger than the evidence upon which it is predicated. The arguments in the present case are not supported by the evidence. "Whether a statement or confession is voluntary depends on the facts in each case. * * *" *State* v. *Pierce, supra.* (4 N. J. 252).

In line with this Court's pronouncement that the requirement of due process is to prevent fundamental unfairness in the use of evidence, whether true or false, and that

in order to declare a denial of due process there must be a finding that the absence of fairness fatally infected the trial (*Lisenba* v. *California, supra,* 236), the respondent believes it worthy of note that the petitioner took the witness stand in his own defense and thereupon admitted each element necessary to support his conviction. These admissions may be outlined as follows:

(1) Petitioner admitted that he went to the home of Jeremiah Delhagen with the intent of robbing him (R656a-36; R657a-28);

(2) Petitioner admitted breaking and entering the home of Jeremiah Delhagen (R647a-11);

(3) Petitioner admitted committing robbery by taking $300 from the person of Jeremiah Delhagen (R648a-14; R677a-23 to R678a-34; R579a-14; R579a-28);

(4) Petitioner admitted that Jeremiah Delhagen was struck repeated blows until he was barely conscious (R678a-40; R647a-29);

(5) The undisputed medical testimony established beyond any possibility of a doubt that Jeremiah Delhagen died as a result of the multiple blows administered by petitioner and his cohorts.

In view of these voluntary admissions made under oath in his own defense, it is difficult to perceive any substance to petitioner's present argument that his conviction was obtained as a result of an allegedly coerced confession.

POINT V.

The petitioner was not prejudiced by the Prosecutor's summation; the entire trial, including the Prosecutor's summation was implicit with fundamental fairness.

The petitioner asserts that the Prosecutor made comment during his summation upon facts not in evidence, thereby precluding the petitioner from a fair trial.

Petitioner argues in his brief (pp. 92-93) that the Prosecutor improperly referred to one John Dean. In order to evaluate the worth of this argument and to demonstrate its futility, it is appropriate to examine those portions of the record in which John Dean is mentioned.

Mention of John Dean was made by counsel for the petitioner in his opening statement to the jury in the following manner (R27a):

> " * * * we are going to show you, and I think we are going to be on all fours, both sides, that but for the intervention of this man (John Dean) these boys would not be on trial here today and the Court would not be here and you folks at this Christmastide wouldn't be tied up doing your duty under oath on behalf of the State and on behalf of these boys."

From the apparent content of counsel's opening statement, it would appear that the defense would present positive proof that the defendants were driven to crime or directed in their efforts by this person, John Dean. Was this promise fulfilled? No, not one shred of evidence was presented, or offered, to prove or even intimate the truth of this promise.

However, petitioner's counsel was not content to abandon his promise by failing to present any proof to support it, but on summation he spoke of John Dean in the following manner (R857a-10 to R858a-33):

> " • • • in our investigation we came across certain factors which we indicated to you in our opening, factors that we of the defense did not have anything to do with, factors that we found as a result of investigation, factors that had been known to the prosecution for a long time before, and amongst those factors we came across Dino, and my friend is going to tell you about Svengali and he is going to tell you about this mature person, and I challenge my friend to explain to you, to knock out from your considerations the questions which I put to you about Dino, or whatever his name is, these facts, because if it wasn't for Dino, the mature person, not one of these boys would be here today. Wherever he sits, if he is in the courtroom, I hope he looks at these baby blue eyes of Bobby Berry, because they are the only thing similar to a cherub's eyes that you will ever see, and then at the boy Gene, enmeshed, engulfed in this abyss which he finds himself in, not knowing what is going on, and sees these sorrowful eyes of Vaszorich, until his dying days. I hope he carries a recollection of this because but for him, because of the filthy lucre which he has in his pocket today, if he did not actually divide, but for him not one of these boys would have been here today.
>
> You are going to take those pants of Brown's that are in evidence, that my friend told you had blood on them. I want you mothers and fathers to consider, if your boy was out until three or four o'clock in the morning and came home, would you sometime in the course of a month look at his pants and see what was on them? Don't you suppose that that Svengali, murderer, crook, whatever he is, knew in

> that month's time that that boy's pants had blood on them? Why didn't he go to the police, as any other decent right-thinking man would, and say, 'Gentlemen of the law, there is something wrong. This boy that I have taken in for some 15 months has got what looks to me like blood on his pants. Find out what it is, will you? He was out until 4 o'clock on the night of the Delhagen killing. I don't know that he is connected with it. Find out. And, gentlemen of the law, I must tell you this too. I must state to you that shortly after the Delhagen incident he gave me a hundred dollars in payment of an automobile and, gentlemen, I am raising that question for your consideration and investigation, because at that time my boy wasn't working? My boy wasn't working.'
>
> Where in God's name can you justify that conduct when but for the intervention of Dino Brown would never have known where Delhagen was, and certainly Berry and Vaszorich wouldn't have been there."

The caliber of argument was grossly unfair. Counsel's opening promise proved to be unfounded, and his summation continued this speculation in full reliance upon *matters not in evidence,* i. e., the details of his asserted investigation.

The Prosecutor was fully justified, if not duty bound, to make fair comment upon these matters argued by the defense. This was done in the following manner (R874a):

> "My good friend speaks and spoke for the past, for the past two weeks at least, of Svengali. John Dean sat in this courtroom—I think his name is John Dean—sat in this courtroom during every day of the two weeks that you ladies and gentlemen were selected; and John Dean sat in this courtroom dur-

ing this entire trial. He is this Svengali. He is the Svengali, and John Dean may be in this courtroom this morning; I don't know; but I offered a special session of the grand jury to counsel if they had one iota of evidence to present against John Dean to show any connection with this case.

John Dean means nothing to the state. If he is implicated, then he should go. If he is implicated he is guilty; but we questioned John Dean. We took a statement from him. I showed the statement to all three members of the counsel before this case ever started. They read that statement."

It is submitted by the respondent that in view of the unfulfilled opening promise by Vaszorich, coupled with his summation grounded in conjecture and speculation, the summation of the Prosecutor was morally right, logically reasonable, and justified by the record.

The following are New Jersey cases in which it was held that remarks of the Prosecutor were not prejudicial, but well within the evidence and reasonable inferences therefrom.

In *State* v. *Cioffe,* 128 N. J. L. 342, aff'd 130 N. J. L. 160 (E. & A., 1943), defendants were referred to as "scourges coming into the country;" "users of guns"; and "sources of seeds which must be removed."

In *State* v. *Barker,* 68 N. J. L. 19 (Sup. Ct., 1902), the prosecutor said that "a verdict of acquittal would be a miscarriage of justice."

In *State* v. *Lang,* 75 N. J. L. 1 (Sup. Ct., 1907), defendant was referred to as a "monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught."

In *State* v. *Tansimore*, 3 N. J. 516 (Sup. Ct., 1950), the prosecutor told the jury, "Don't let this man, twice bloody, go twice unbowed." The remarks were held to be morally right, logically reasonable and justified by the record.

It is respectfully submitted that when the remarks complained of are read with the full context of the summation in connection with the evidence in the case, it cannot be said that they were inflammatory or prejudicial. On the other hand, the remarks were logically reasonable and fully justified by the record and the conduct of petitioner's counsel.

Again the respondent directs this Court's attention to the fact that in rendering its opinion the court below did not decide any federal question and petitioner is thereby precluded from urging his present argument. *Whitney* v. *California*, 274 U. S. 357, 360; *Dewey* v. *Des Moines*, 173 U. S. 193, 200. The opinion of the Supreme Court of New Jersey (*State* v. *Vaszorich*, 13 N. J. 99, 118-120; petition pp. 43-44) indicates that the court disposed of the question on the ground that the jury was adequately instructed to ignore any remarks made by counsel, and to guide their deliberations by their own recollections.

POINT VI.

The manner in which the jury returned its verdict is solely a matter of the interpretation and enforcement of the laws of the State of New Jersey and no federal question is involved.

As stated by this Court in *Twining* v. *New Jersey*, 211 U. S. 78, 91:

> "* * * If the right here asserted is not a Federal right, that is the end of the case. We have no au-

thority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws."

In order to fully appreciate the direct application of this rule of restraint to the petitioner's present argument, the facts are briefly summarized as follows:

Under the provisions of the appropriate New Jersey statute[7] the obligation of the jury in murder cases is to designate by their verdict, if they find the accused guilty, the degree of murder. This statutory direction has been subject to interpretation in various cases in which irregularities have appeared in the announced verdict. *State* v. *Cooper,* 2 N. J. 540 (Sup. Ct., 1949); *State* v. *Cleveland,* 6 N. J. 316 (Sup. Ct., 1951); *State* v. *Greely,* 11 N. J. 485 (Sup. Ct., 1953).

These cases fall into two categories and have been so considered by the New Jersey courts:

(1) Those cases in which the *collective* verdict of the jury, as announced by the foreman, is lacking in the required designation of first or second degree murder. *State* v. *Cooper, supra,* wherein the collective verdict was one of "guilty" with no designation. Such a verdict is fatally defective and cannot be cured by the polling of the jury. *State* v. *Greely, supra.*

(2) Those cases in which the collective verdict properly designates the degree of murder but the polling of the jury shows that the verdict was grounded in ambiguity and misapprehension in the minds of the jurors. *State* v. *Cleveland, supra,* wherein the collective verdict was "guilty of

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[7] See footnote 4, p. 3.

first degree murder", but a polling of the jury brought responses of merely "guilty". This verdict was held to be defective.

Such being the two classifications, the case of *State* v. *Myers*, 7 N. J. 465 (Sup. Ct., 1951), was next decided by the Court. Speaking through the same Justice that rendered the Court's opinion in the *Cleveland* case, the Court held that a proper collective verdict, assented to by the individual jurors on a polling by a response of "yes", was proper because it displayed agreement with the collective verdict and was not grounded in ambiguity.

The next development in the interpretation of this statutory provision is found in the instant case. *State* v. *Vaszorich*, 13 N. J. 99 (Sup. Ct., 1953). Here there is a situation in which the collective verdict was in accordance with the required statutory designation, but a variation of responses in the polling of the jury. The collective verdict was "guilty of first degree murder, with no recommendation" (R915a-16). Upon a polling of the jury each juror, with the exception of jurors 4, 7 and 11 reiterated the collective verdict. In disposing of this question, and distinguishing *State* v. *Cleveland, supra,* the Supreme Court of New Jersey said (*State* v. *Vaszorich,* 13 N. J. 99, 126-127; petition pp. 52-54):

> "The fact of individual *concurrence* is the objective. * * * otherwise stated, 'to ascertain from each juror whether his individual conclusion was correctly expressed by the verdict which the foreman rendered' * * *
>
> "The required assent of each juror to the correct verdict rendered by the foreman need not be in formal or literal style, provided only that it be unmistakable in meaning. * * *

"We do not think that the jurors' answers under attack here violated this important safeguard. * * *"

The foregoing factual recitals and case citations have been made in order to demonstrate the clearly apparent fact that no federal question is involved or decided in the determination of this question by the Supreme Court of New Jersey. The Court was dealing exclusively in an interpretation and enforcement of the local law of New Jersey.

Conclusion.

It is respectfully submitted that for the reasons set forth herein and upon the authority of the citations in support thereof, that the writ of certiorari be denied.

Respectfully submitted,

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